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Legal control of administrative action in Scotland : an evaluation of the  
role of the Sheriff Court

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**"Legal Control of Administrative Action in Scotland: An Evaluation of the  
Role of the Sheriff Court"**

**Gavin Forbes MacLeod Little**

**PhD Thesis  
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## ABSTRACT OF THESIS (Regulation 3.5.10)

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### Aims

To evaluate the statutory jurisdiction of the Sheriff Court in Scottish local administration. This involves consideration of significant powers held in a wide range of areas: for example, compulsory hospitalisation of the mentally ill, appeals over parental choice of school, assumption of parental rights by local authorities, and licensing appeals.

### Objectives

1. To establish theoretical general principles based on the constitutional ideal of the rule of law, which encourage definition of the judicial role, and the advantages and disadvantages of court-based adjudication as a decision-taking process in the administrative law arena. These can be used as standards in the evaluation of the sheriff's multifarious statutory duties in local administration.
2. To set out the historical development of the sheriff's jurisdiction in local administration, in order to illustrate: (i) the socio-legal factors which have influenced the evolution of the sheriff's role; (ii) the confusions which have arisen in case law; and (iii) the amorphous nature of the jurisdiction.
3. To resolve the confusion surrounding the sheriff's jurisdiction in local administration by: (i) giving close attention to current case law; (ii) categorising the sheriff's current powers on the basis of the theory and general principles of the rule of law, and the historical material; and (iii) providing empirical material which gives an idea of how often individual powers are exercised in practice.
4. To evaluate the sheriff's current powers according to the standards set out under the theory and general principles of the rule of law by: (i) library based research into the different categories of power; and (ii) detailed empirical research into how representative powers operate in practice. The advantages and disadvantages of shrieval adjudication are also considered in more general terms.

### Conclusions

Some categories of the sheriff's powers are identified as being either anomalous in terms of the theory and general principles of the rule of law, or obsolete: these are contrasted with categories which are neither. There is little justification for the continuation of the former, although the latter could be developed further. It is stressed that case law is confused and anachronistic; and that there are a number of serious deficiencies in sheriff court practice.

**I declare that this thesis has been composed by myself.**

**Gavin Forbes MacLeod Little**

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## Introductory Chapter

### Section One: Research Aims

The role of the Scottish sheriff in providing statutory review of administrative action at a local level is a subject which, until recently, has received little attention from academic lawyers: discussion of administrative law in Scotland has tended to focus on common law judicial review, tribunals, administrative decision taking, and the local ombudsman. This is not surprising, given that review of the decisions of public bodies has only come to be a significant area of legal practice and research in Scotland within the last twenty-five years<sup>1</sup>. In addition, it could hardly be argued that the most important developments in administrative law have taken place in the Sheriff Court. It should not, however, be thought that the sheriff's powers in local administration are insignificant. This point was made in the administrative law title of the Stair Memorial Encyclopaedia of the Laws of Scotland:

"The ordinary courts of law may, in addition to their general jurisdiction, exercise specialised functions involving the confirmation of, or hearing of appeals from, the decisions of public authorities. Thus the sheriff has a wide variety of statutory tasks in matters concerning local government. Some of these have been held to be administrative, even although they are exercised in a judicial forum, partly because the sheriff may be required to exercise a broader discretion than would normally be appropriate to a court reviewing the decisions of local authorities. Other statutory functions have been held to be judicial, for the reason that a true lis inter partes is before the sheriff. However, the reasoning in these cases has seldom been clear-cut."<sup>2</sup>

As will be made plain, the lack of "clear-cut" reasoning in the sheriff's exercise of his statutory functions follows directly from the lack of consistency in the powers of review which Parliament has granted to the sheriff. Bradley, in Scottish Law Commission Memorandum Number 14, "Remedies in Administrative Law", pointed out that "... a fully satisfactory means of answering the uncertainty relating to the sheriff's powers on administrative appeals would be the development of general principles on which the sheriff's powers should be exercised. Detailed research into the actual work of this kind undertaken by sheriffs would be necessary to establish the practical value and effectiveness of the sheriff as a local remedy against local government decisions."<sup>3</sup> His statement provides the starting point for discussion.

Accordingly, the main aims of this thesis are to provide a detailed exposition of the sheriff's statutory powers in local administration; to suggest "general principles" of the sort envisaged above; and to evaluate and criticise the sheriff's role.

## **Section Two: Background to Research Aims**

It is fair to ask why the sheriff's powers should be singled out for particular attention. The answer to this question lies in their nature, and in the issues that they raise. The sheriff's powers within local administration are acute examples of the British tradition of law and government, which can be characterised as pragmatic, ad hoc and lacking in theoretical direction.

Under some statutes the sheriff holds an apparently unfettered (and usually final) discretion to review public authority decisions<sup>4</sup>: there are also similar powers in which the sheriff's discretion is, ex facie, that of a public authority charged with

taking final decisions at first instance<sup>5</sup>. In other statutes, powers of review are interpreted as providing for a "true lis"<sup>6</sup> between the parties, or, alternatively, a statutory formulation similar to the grounds of common law judicial review limits shrieval discretion<sup>7</sup>. In the first two categories sheriffs interpret their powers as the modern derivative of an historic role in which the sheriff acted as the local "administrative" or "ministerial" officer of the Crown<sup>8</sup>, and in the two latter categories they view themselves as serving in a more obviously "judicial" role<sup>9</sup>. Although the statutes themselves give no indication that Parliament is aware of any such distinctions, sheriffs are sometimes able to choose, when interpreting their powers in local administration, whether or not they are to act "administratively", or "judicially"<sup>10</sup>, thereby effecting a primitive internal separation of powers.

The first two categories of powers raise the issues of whether the sheriff's position is anomalous in the context of contemporary views of the ideal role of the judge and court-based adjudication. If there are anomalies or inconsistencies then they cannot go unchallenged. They also provide an opportunity to evaluate judicial decision-taking, and to explore the boundaries of discretionary power and justiciability in the administrative law arena.

The last two categories facilitate discussion of the effectiveness of court based adjudication as a means of enabling individuals to challenge decisions taken by administrative authorities.

In general terms, study of the different categories of powers and functions can also encourage appreciation of the wider socio-legal pressures which can shape legal development in Scotland, and of the potential of empirical research.

However, it should be noted at the outset that conducting research into the sheriff's jurisdiction within local administration is not an easy task, for four inter-related reasons, which must be taken into account.

First, although some detailed work has been carried out on the sheriff's powers in local administration, it is a relatively unresearched area of law. With the exception of a series of papers by Himsworth<sup>11</sup>, the literature covering the jurisdiction is essentially descriptive, as opposed to analytical. Accordingly, one is faced with a mass of seemingly disparate statutory provisions, set out in alphabetical order for the benefit of sheriff court practitioners<sup>12</sup>. This form of presentation is not without merit, as it enables an appreciation of the size (on paper) of the jurisdiction, and also of the remarkable range of the subject matter. However, it does little to further understanding of the nature of functions performed by the sheriff, or indeed why the sheriff should have any such functions: similarly, it does not facilitate an appreciation of their effectiveness.

Second, the amorphous nature of the shrieval jurisdiction within local administration causes difficulties: the descriptive style of the practitioners' texts is essentially a function of this. Indeed, the use of the term "jurisdiction" is potentially misleading, as it implies an homogeneous character to a large and seemingly disparate body of statute law. The most recent textbook on sheriff court practice provides a list<sup>13</sup>, which is not exhaustive, of approximately 200 statutes, which empower sheriffs to act in local administration: for example, sheriffs may be called upon to decide cases dealing with licensing, mental health, social work, education, public health, housing and the environment<sup>14</sup>. Furthermore, individual statutes may



provide for different styles of appeal on different grounds under different sections. Many of these powers are not inconsiderable and may involve weighty, controversial issues: under s.18 of the Mental Health (Scotland) Act 1984<sup>15</sup> sheriffs are responsible for the compulsory hospitalisation of the mentally ill; under s.16 of the Social Work (Scotland) Act 1968<sup>16</sup>, they decide what constitutes the best interests of a child in the assumption of parental rights by a local authority; and under s.28 of the Education (Scotland) Act 1980<sup>17</sup>, they effectively decide on the merits of a local authority's policy on school admissions. In addition, the position of the sheriff varies from statute to statute (and within individual statutes), with sheriffs appearing at different levels in the decision taking process.

Third, attempts by the courts to analyse the sheriff's powers are inconclusive, given that they are hampered by the time consuming and inherently restrictive process of developing concepts and theories by precedent. Indeed, given the conceptual difficulties caused by different lines of argument in the relatively few contentious cases in the field, the last eighty years<sup>18</sup> have seen little advance in resolving confusion over the nature of the sheriff's special "administrative" jurisdiction, and how wide the limits of any "administrative" discretion to review public authority decisions should be.

Finally, there is a lack of useful official data regarding the frequency with which the individual statutory powers which comprise the jurisdiction are exercised: the Civil Judicial Statistics, as compiled by the Scottish Courts Administration, merely categorise "miscellaneous and administrative" business into general headings, which can sometimes raise more questions than they answer<sup>19</sup>. Only a very few

statutory functions are singled out for individual noting, and even then the collation of figures is done on an extremely general basis. Unfortunately, most of the statutory appeals in the field that this study is concerned with come under the rather unhelpful heading of "other business". This is no doubt due to the fact that the sheriff's powers in local administration are not seen as a major part of the Sheriff Court jurisdiction. The 1967 Grant Report on the Sheriff Court<sup>20</sup> stated that the amount of time spent on this type of business amounted to no more than 5% of court time<sup>21</sup>. However, the number of cases brought to court and the amount of time taken up may bear no relation to the seriousness or policy significance of a single decision, a point which is taken further below.

With the above obstacles and problems in mind, it should be clear that achieving the aims of this thesis necessarily involves not only library based legal research, but also a significant empirical element. Accordingly, the outline of research objectives set out below stresses the importance of synthesising library based research and empirically derived data.

### **Section Three: Research Objectives**

In order to fulfil the research aims as set out above, the thesis is sub-divided into four main parts. The points and arguments which are made are then brought together in a concluding chapter. The objectives of the constituent parts are as follows.

- (i) Part One is concerned with theoretical issues: general principles are established for the allocation and exercise of judicial powers of review under statute

in administrative law.

Chapter one lays the foundation for general principles. Rather than focusing on the sheriff's role in local administration, consideration is given to wider issues. The relevance of distinguishing decision taking functions and the nature of adjudication are discussed. This then leads on to an evaluation of rule of law theory, and its general constitutional significance. Particular attention is given to the status of the judiciary and the integrity of court based adjudication as a decision taking process. A version of rule of law theory is developed, and the importance of maintaining it through legislation and court decisions is explained.

Chapter two sets out general principles for the allocation and exercise of judicial powers of review under statute in administrative law. Two categories of general principles are provided: the first concerns legislation and the allocation of functions; and the second concerns the exercise of statutory powers by the judiciary. Both are based around the rule of law theory set out in chapter one.

The general principles and rule of law theory developed in these two chapters are used throughout the thesis as a means of evaluating the historical development of the sheriff's powers in local administration, the current jurisdiction, and empirical material which was derived from fieldwork research into how individual powers operate in practice.

(ii) Part Two traces the historical development of the sheriff's jurisdiction in local administration. The objective of the exercise is not simply to explain how and why sheriffs have come to exercise their present functions. It is intended to develop a perspective, which puts statutory powers and court decisions into a wider historical,

constitutional, socio-legal and theoretical context. The chapters in part two also lay the foundation for part three, in that consideration of the sheriff's powers and the way that they have been interpreted by the courts encourages the development of distinctions between different styles of powers: this in turn provides a degree of homogeneity in discussion of the sheriff's current jurisdiction.

(iii) Part Three sets out and evaluates the jurisdiction of the modern sheriff. Consideration is given to recent developments in case law and more general issues: this brings the historical coverage in part two up to date. The sheriff's current powers are then categorised in an analytical framework, which distinguishes between different styles of powers. The analysis is based on the theoretical approach established in Part One and the historical developments noted in Part Two. Four main categories of power are noted, and individual provisions are allocated to them. The objective is to systematise the sheriff's powers in order to evaluate them more effectively than would otherwise be possible. Identifying the main features of the different categories facilitates criticism of the sheriff's functions.

The last chapter in part three sets out the results of a fieldwork exercise, which sought to overcome the weaknesses of the Civil Judicial Statistics. The findings provide a more informed impression of the number of appeals which come before the courts, and identify the powers which are exercised most frequently.

(iv) Part Four criticises the sheriff's current jurisdiction using the theory and general principles of the rule of law developed in Part One as the main criteria for evaluation. The discussion is split into four chapters, with one chapter for each category of powers. The theoretically based evaluation made in each chapter is tested

and confirmed using detailed empirically derived material. The fieldwork projects also examined how specified provisions operate in practice, and full use is made of the findings to determine the advantages and disadvantages of shrieval adjudication: the provisions were selected on the basis of the material set out in Part Three.

The thesis is then concluded with a chapter which sets out the main arguments, and makes a number of suggestions which might be of some value in any future reconsideration of the sheriff's statutory function in Scottish local administration.

## **Chapter One: Adjudication and the Rule of Law**

### **Introduction**

The purpose of this chapter is to provide a theoretical background for "general principles", which are set out in chapter two<sup>1</sup>. These are intended to promote an ideal which may be used to evaluate the appropriateness of the statutory provisions which comprise the sheriff's jurisdiction in Scottish local administration. General principles are in themselves nothing more than the expression of a particular perspective on the role of the legal order in administrative law. Accordingly, before they can be established, it is necessary to give some consideration to the nature of court based adjudication, and what makes it distinctive and important. The chapter is sub-divided into three main sections, which explore general themes and arguments concerning adjudication, decision taking in general, the rule of law and judicial discretion. A brief concluding section then summarises the main points of interest.

### **Section One: Distinguishing Decision Taking Functions and Adjudication**

The Report of the Donoughmore Committee on Ministers' Powers of 1932 sought to set out definitions of "judicial", "administrative" and "quasi-judicial" decisions<sup>2</sup>, with a view to delineating the functions of the courts and government ministers, and was criticised for succumbing to a flawed, circular logic, which essentially reduced analysis almost to the level of, "if a decision should be taken by a judge, it is a judicial decision."<sup>3</sup> Notwithstanding Jennings' contemporary critique of the Report, which was to the effect that there was "no essential distinction between an administrative decision in an instant case and a judicial decision"<sup>4</sup>, the debate on

the ideal roles of the court and administration has continued<sup>5</sup>, although its terms of reference have moved on from making narrow distinctions between rigid categories of "judicial" and "administrative" functions<sup>6</sup>. Most public lawyers are able to perceive that there are aspects of court based adjudication (eg, the impartiality and independence of judges, or procedural safeguards) which may make a judicial solution to a particular problem more desirable than less constrained administrative decision taking (or vice-versa). A loose "tagging" of functions is therefore convenient<sup>7</sup>. However, we are not much further forward in terms of determining precisely when court based adjudication should be viewed as a suitable decision taking process in public law. This is partly because our legal system and public law lack a formal constitutional context, and accordingly discussion of the suitability of allocating functions to courts or administrators can be characterised as an anchorless debate, and partly because making strict distinctions can become a sterile and ultimately rather artificial exercise. However, it is contended that it is not an altogether pointless one. Distinguishing powers, if kept within sensible and practical parameters can have a useful and justifiable function: thinking about different styles of decision taking and how they differ furthers understanding of how adjudication functions in administrative law, and the nature of the judicial role in the wider context of the political constitution. In particular, it focuses attention on the position of the judiciary in cases which involve the exercise of judicial discretion in areas with "direct political involvement". By "direct political involvement" I mean a situation in which a judge may be required to make a direct evaluation of the policy merits of decisions reached by elected politicians (or their officials) in areas which are highly

influenced by political considerations<sup>8</sup>.

Attention should therefore be given to some of the academic theories which have sought to set out intellectual mechanisms for the allocation of decision taking functions according to concepts which attempt to determine the suitability of adjudication and the range of judicial power or discretion<sup>9</sup>.

The inter-related issues of the suitability of adjudication and the limitation of judicial power will each be considered in turn: in general terms, the subject matter may be characterised as the determination of the "justiciability"<sup>10</sup> of particular types of dispute.

Before considering these concepts, however, some thought should be given to the definition of adjudication itself: what are its distinguishing characteristics? Fuller defined adjudication as "a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour."<sup>11</sup> Following on from this, Jowell saw adjudication as "a means of institutionally guaranteed participation, since each party to the dispute may present proofs and arguments to the adjudicator."<sup>12</sup> Fuller's theory makes a number of assumptions. The main ones are as follows. The adjudicator should be impartial, and must not make his decision until the proofs and arguments are complete: both sides in the dispute must be given fair and equal opportunity to present reasoned arguments<sup>13</sup>. In addition, the adjudicator must base his decision on recognisable rules, standards or principles, which must be generalisable and capable of application in future "like" cases<sup>14</sup>. Reasons must be given for decisions. The most obvious adjudicators are judges sitting in courts of law,



although other institutions (eg some tribunals) may be perceived as being adjudicatory in nature, depending on the number of procedural restrictions imposed on the process and the decision takers<sup>15</sup>. Given that I am concerned with the sheriff court, this thesis is concerned solely with court-based adjudication, which can also be referred to as "ideal type" adjudication<sup>16</sup>.

There are a number of important correlative consequences of "ideal type" adjudication, which must be borne in mind. Firstly, it can depoliticise decision taking because the judge is perceived to be impartial: the impartiality of judges (as opposed to other decision takers) is protected by constitutional measures which are intended to guarantee the independence of the judiciary from political influence<sup>17</sup>. Second, adjudication can be characterised as reactive to individual disputes, rather than proactive in terms of resolving more general conflicts in society<sup>18</sup>. Third, because the court's adjudicatory process is concerned with specific, individual disputes, it focuses attention onto the facts of the instant case, and the legal rights of individual parties to the dispute<sup>19</sup>. This means that, as a theoretical "ideal type", it is a powerful intellectual mechanism for those who are concerned with the promotion of a society structured around individual freedoms and personal rights<sup>20</sup>. Accordingly, court based adjudication has a prominent role in the writings of old fashioned Whigs such as Dicey<sup>21</sup> and Hewart<sup>22</sup>, and is implicitly of considerable significance for modern libertarians such as Hayek<sup>23</sup>.

Defining court based adjudication effectively defines administrative decision taking. It may therefore be characterised as being a "social process of decision"<sup>24</sup>, which gives to the decision taker a discretion normally denied to judges, which might

include the power to take decisions directly on the basis of political factors<sup>25</sup>. It should be noted, however, that it is not being argued that judges do not have discretion, or that their decisions do not have policy implications<sup>26</sup>: in addition, an administrator's discretion "... may be constrained ... by non legal factors, such as the amount of available resources, time, professional norms, and the political pressures to which the decision taker is (or perceives himself to be) subjected.<sup>27</sup>" Dworkin illustrated the nature of discretion by analogy: "Discretion like the hole in the doughnut does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask "Discretion by which standards?" or "Discretion as to which authority?"<sup>28</sup>"

Galligan has stressed that it is important to view administrative discretion in this context, for it is all too often that administrative discretion is confused with arbitrary power<sup>29</sup>. This leads to a profound misconception of its nature, and a consequent crippling of debate<sup>30</sup>. He pointed out correctly that the nature of administrative discretion varies considerably according to the nature and subject matter of decision<sup>31</sup>. Most importantly, he argued that there "... is a tendency to generalise policies so that they serve not merely to decide one particular case, but ... guide decisions in all cases to which they are relevant.<sup>32</sup>" Using such guides to decision taking is known as the "principle of individuation<sup>33</sup>", and in its exercise, the guides utilised by administrators may vary from the general to the specific: there is no such thing as a "standard" administrative decision, as lawyers often imply<sup>34</sup>. However, there are still important distinctions between administrative decision taking and judicial decision taking.

Unger has provided a useful definition of the distinction between the "standards" or "authority" of the two styles of decision taking:

"The administrator focuses on the most effective means to realize given policy objectives within the constraints of the law. For him, the rules of law are a framework within which decisions are made. For the judge, on the contrary, the laws pass from the periphery to the centre of concern: they are the primary subject matter of his activity. Adjudication calls for distinctive sorts of arguments, and its integrity demands specialized institutions and personnel.<sup>35</sup>"

Consideration should now be given to the question of how the limits of court based adjudication might be devised. Fuller saw the problem in conceptual terms, concentrating on procedural efficiency in the decision taking process: adjudication by courts is unsuitable when the degree of "polycentricity" becomes procedurally inefficient<sup>36</sup>. Polycentricity is therefore a test of the "integrity", or suitability, of adjudication as a decision taking process. Fuller described polycentricity in general terms, and therein lies both the attraction of the concept, and its weakness in terms of providing an objective test:

"We may visualise this kind of situation [ie a polycentric one] by thinking of a spider [sic] web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centred" - each crossing of strands is a

distinct centre for distributing tensions.<sup>37"</sup>

The attraction of this concept is immediately apparent. It clarifies the issues which are at the nub of administrative law: the advantages and disadvantages of the courts' concentration on instant facts and individual rights through adjudication, in the context of the wider public policy implications of decisions. However, the weakness of the polycentric model is that it does not give any firm indication of when Fuller's own "limit" of adjudication is reached. Indeed, he was well aware that the recognition of this point was ultimately subjective:

"Now, if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted to adjudication. .... It is not a question of knowing when black is white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.<sup>38"</sup>

Determining the point where polycentric elements predominate is obviously difficult, and it is inevitable that any such evaluation will always be open to criticism of some kind. Democratic accountability and political considerations are part of the polycentric web: adjudication is clearly inefficient (in a wide construction of the term) if it leads to a loss of confidence in the judiciary and legal process - a constitutional crisis<sup>39</sup>. Accordingly, Galligan has argued that; "The fact that they [courts] are outside the lines of direct accountability to the political process makes the position of the courts problematical in imposing restraints on discretionary authorities, which are themselves politically accountable.<sup>40"</sup>

However, without being unduly negative, some theories have the potential to cause fundamental problems as they do not give sufficient thought to the implications of prescribing court based adjudication as a decision taking process in politically sensitive areas.

For example, Lord Scarman argued that the courts must be prepared to meet the "social challenge" posed by the development of the welfare state<sup>41</sup>, and, in particular, the social security system. He felt that if the courts failed to involve themselves in developing areas of administrative justice, the result would be an unwelcome "retreat from the universality of the common law"<sup>42</sup> - despite the fact that the legislature was plainly unenthusiastic about court involvement<sup>43</sup>. Lord Scarman argued that the legal profession (presumably including judges) must work out a "socially-effective response"<sup>44</sup> and approved of judge led activism as a means of doing so. The central issue to be resolved was defining the "... extent to which the courts should question the justice of an administrative decision: ..., can, or should, the courts assess the evidence, or lack of it, in determining whether to uphold, modify, or quash the decision?"<sup>45</sup> He was critical of the traditional reticence of judges and lawyers to involve themselves directly in the political process, because "This view would exclude the ordinary courts, administering the general law, from reviewing the merits of the decision: it is as if lawyers are to be banned from refereeing the match, though judges may act as linesmen and practitioners may cheer on the players."<sup>46</sup> He was, however, approving of the response of judges in commercial and financial fields. There, "... where also the state has intruded with its administrative agencies, the judges are ready to take the activist line, and intervene

if there is no substantial evidence to support the administrative or tribunal decision, if the tribunal took into account a factor which they had no right to take into account.<sup>47</sup>"

Lord Scarman's comments should be seen in the context of the tense relationship between judiciary and Parliament, although he showed little real appreciation of the fact that the debate was a highly political one<sup>48</sup>. The end result of developing this type of approach may eventually be a constitutional crisis, which would undermine the integrity of ideal type adjudication. Courts are not capable of assessing "the public interest" effectively in cases involving the policy based decisions of, for example, government ministers or local authorities: they are appointed rather than elected, and they are not functionally competent, as the court process and the focus on the individual case mean that judges have no effective mechanism by which they can fully assess the polycentric implications of their actions<sup>49</sup>. It is contended that what Lord Scarman described as the "self confidence" and "independence"<sup>50</sup> of the judiciary are fragile and easily destabilised attributes. As such, they would be unable to survive the pressures imposed by judges taking a pro-active approach in cases with direct political implications for elected authorities. A constitutional crisis would therefore be almost inevitable<sup>51</sup>. In addition, as Griffith and others have argued, it is a matter of some doubt whether judicial attitudes as they stand at the moment are such as to inspire public confidence in the ability of judges to take a new role upon themselves<sup>52</sup>.

Those attempting to advance a concept of "substantive legitimate expectation"<sup>53</sup> (as opposed to procedural legitimate expectation) under the general

heading of "procedural impropriety" in common law judicial review are treading a similar, albeit narrower, path as Lord Scarman. Developments of this nature are, it is contended, to be treated warily, as Lord Devlin would no doubt have agreed when he made his stinging attack on "... progressives who like moths outside a lighted window are irresistibly attracted by what they see within as the vast unused potential of judicial lawmaking"<sup>54</sup>. Despite the strong nature of his imagery, it is submitted that he was generally correct in his approach, and given the potential danger of well-meaning but perhaps misguided exhortations of the sort mentioned above, he was perhaps equally correct to express himself in such blunt terms.

The danger is that of facilitating a level of flexibility for judges which may potentially undermine the rule of law in the long term. The rule of law in practice relies on the positivistic concept that judges are seen to be impartial and independent of the political process<sup>55</sup>. Obviously, as Lord Scarman implied, this is intellectually unsustainable, in that to have a role in the business of government (as judges obviously do on a wide interpretation of the term) means that one must consciously or unconsciously express a political view<sup>56</sup>. However, this does not detract from the argument that to move away from the powerful fiction of impartiality may in time result in the degrading of the ideal concept of the rule of law: it will become observable that judges involve themselves directly in the political process in a way which is irreconcilable with traditional theory<sup>57</sup>. However, before going any further, it is important for us to give some consideration to the concept of the rule of law, for if it is of no real significance, there can be no strong objection to it being undermined.



## **Section Two: The Rule of Law**

Discussion of the rule of law in the United Kingdom is inevitably coloured by Dicey's championing of it, along with Parliamentary sovereignty, as the basis of his theory of the English constitution<sup>58</sup>. Given that Dicey's theory has been heavily criticised by the British left as the idealisation of the liberal, capitalist state for the benefit of the political establishment<sup>59</sup>, and, even by sympathetic academics, as lacking sufficient intellectual rigour<sup>60</sup>, it is not surprising that the phrase "rule of law" has attracted controversy and suspicion. Conservative MPs have adopted it as part of their own vocabulary<sup>61</sup>, and the Marxist historian EP Thompson was condemned for concluding that the rule of law was "an unqualified human good"<sup>62</sup>.

Dicey's well known, and often criticised argument, was that the rule of law has three essential features: first, "... that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land..."; second, "... no man is above the law, but (what is a different thing) that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals..."; and third, "... that the general principles of the constitution ... are with us the result of judicial decisions determining the rights of private persons in particular cases before the courts..."<sup>63</sup>.

Set in its context, Dicey's vision of the rule of law was intended to serve as an anchor for Whig liberalism, which was endangered by the drift towards state



expansionism. He was concerned to protect the rights of individuals from the encroachments of the state (and state functionaries exercising discretionary power) through the mechanism of adjudication in the ordinary courts<sup>64</sup>. Viewed in this light, it can be appreciated that Dicey made an important contribution to constitutional debate. Unfortunately, the way in which he made his argument was bedeviled by inconsistencies and mistakes.

Dicey's failings have been laid bare by subsequent writers on constitutional law<sup>65</sup>. The main ones are so serious that they effectively remove much of his overall theory from the ambit of serious academic discussion<sup>66</sup>, although it is submitted that he was entirely correct to be concerned with the protection of individual freedom. However, even as an attempt to describe the constitutional arrangements of the late nineteenth century, his theory was based on an incomplete and biased assessment of fact. He ignored the many Crown privileges and immunities which were in operation; and his evaluation of continental systems of administrative courts and the nature of administrative discretion (which was invariably confused with arbitrary power) can only be viewed as bigoted misapprehensions<sup>67</sup>. In short, he over-egged his pudding.

So too did Hayek, who may be seen as the twentieth century heir of Diceyan liberalism<sup>68</sup>. In "The Road to Serfdom", he argued against the further development of the state and the congruent expansion of discretionary power. He was concerned to protect the individual's free decision taking capacity from direction by the state<sup>69</sup>. Along with Dicey, he placed great value on the rule of law as the totem which would protect individual freedoms. Indeed, Hayek's arguments were rather more extreme than Dicey's, in that he sought to show that the development of welfarism/socialism

was a direct challenge to the rule of law itself: "... any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."<sup>70</sup> Similarly, any state sponsored attempts to distribute resources or power in society reduced the freedom of individuals as they would be constrained not only in a direct sense by the decisions of state officials, but because they would not be able to plan their affairs freely on account of the uncertainty created by the general exercise of administrative discretion. The ability to predict decisions with some degree of certainty is an important component of the rule of law: administrative discretion (Hayek thought) hampers this, and therefore threatens the rule of law.<sup>71</sup>

It should once again not be denied that Hayek raised important issues for consideration and debate. But, as with Dicey, his views, although better written, were expressed in terms which were almost polemical: this does little to further the significance of the basic theme that individual freedoms must be protected from state despotism. Hayek followed Dicey in confusing all administrative discretion with arbitrary power<sup>72</sup> - a dogmatic assumption which, as Dworkin and Galligan have demonstrated, cannot be sustained<sup>73</sup>. Hayek over-stated his argument, by implying that the only way in which the rule of law can be maintained is to abandon the pursuit of social goals through the state<sup>74</sup>. He often seems to miss the point that while political despotism is a real risk and must be avoided, an undiluted implementation of the rule of law could also be tyrannical, albeit in a different fashion<sup>75</sup>. Finding a balance between the two is a question of degree, and it is submitted that the importance of avoiding both extremes should be appreciated.

Accordingly, it is contended that the rule of law is best considered in the

context of theories which take a rather more comprehensive view than Dicey or Hayek. Raz, in "The Rule of Law and its Virtue", is a good starting point<sup>76</sup>. He pointed out that those (such as the 1959 New Delhi International Congress of Jurists) who confuse the rule of law with generic conceptions of altruism, justice, democracy and equality are mistaken<sup>77</sup>. The rule of law may exist in a non democratic state - indeed it may be said to exist (albeit minimally) in states which are racist and oppressive<sup>78</sup>.

Raz's concept of the doctrine is based on the proposition that particular laws should be subjected to general, open and stable ones: the doctrine of the rule of law requires only that "the law must be capable of guiding the behaviour of its subjects"<sup>79</sup>. He identified the eight main principles which can be derived from the doctrine:

1. all laws should be prospective, open and clear;
2. laws should be relatively stable;
3. the making of particular laws (in particular legal orders) should be guided by open, stable and clear general rules;
4. the independence of the judiciary must be guaranteed;
5. the principles of natural justice must be observed;
6. the courts must have powers of review to ensure compliance with the doctrine;
7. the courts should be easily accessible; and
8. the discretion of crime prevention agencies should not be allowed to pervert the rule of law.<sup>80</sup>

Raz felt there were a number of important virtues of the rule of law: these

require further consideration.

First, it acts as a control on arbitrary power, which he rightly saw as a difficult, subjective entity<sup>81</sup>. Not all arbitrary power is incompatible with the rule of law, but some actions which have been identified by the "men in power" (eg the arbitrary use of legal power for personal gain) are "drastically restricted by close adherence to the rule of law". However, the rule of law has no direct control over the exercise of arbitrary power<sup>82</sup>. Raz implicitly recognised that the conflict between the rule of law and administrative power was not as simple as Hayek has implied. Accordingly, the rule of law is not viewed as being an absolute standard which sets the criteria for political society: instead, "... it is a virtue, but only one of the many virtues a legal system should possess."<sup>83</sup>

Second, the rule of law promotes the protection of freedoms held by individuals (although, as indicated above, freedom should not be confused with political freedom). It does this by promoting a legal framework, which enables an individual to "choose styles and forms of life, to fix long term goals and effectively direct one's life towards them"<sup>84</sup>. The framework is devised by "... a policy of self restraint designed to make the law itself a stable and safe basis for individual planning"<sup>85</sup>. It was noted above that this aspect of the rule of law was a central feature of Hayek's argument. However, as indicated above, Raz did not consider that all enactments which limit individual freedoms (eg the exercise of administrative discretion by state officials) should fall. Instead, he favoured a weighing of the merits or demerits of any such process<sup>86</sup>.

This leads on to a consideration of why the rule of law should be of

importance to all public lawyers. Its main significance is that it is only by observing the rule of law that the law respects human dignity:

"Deliberate violation of the rule of law affects not only the external circumstances but also one's very ability to decide, act or form beliefs about the future. A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus supposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations. .... Violations of the rule of law affect one's fate by frustrating one's deliberations, by making it impossible for a person to plan his future to decide on his actions on the basis of a rational assessment of their outcome. The rule of law provides the foundation for the legal respect of human dignity"<sup>87</sup>.

It is intended to base discussion of the rule of law around an adaptation of Raz's "ideal type" model, although his views are not accepted uncritically, as should become clear. What then are the main implications of the rule of law for administrative lawyers? Some points should be noted.

It must be appreciated that the rule of law promotes legal positivism in the sense that the law can be viewed as an autonomous, scientific and impartial mechanism which can be used to impose values which may be perceived as either good or evil<sup>88</sup>. Accordingly, Raz argued strongly that the law was a mechanism which should be viewed as being morally neutral, although he recognised that its exercise may have moral implications<sup>89</sup>.

However, the view that conformity to the rule of law only ensures that law,

whether good or bad, is effectively implemented, deserves critical examination. In arguing that the law is merely an "instrument"<sup>90</sup>, and that conformity to the rule of law is what makes it efficient, Raz contended that "... the rule of law is the specific excellence of the law .... conformity to [it] is the virtue of law itself, law as law regardless of what purpose it serves."<sup>91</sup> However, does his own point that "close adherence" to the rule of law restricts the use of certain types of arbitrary power not indicate that it is difficult to deny that law has a moral content? Similarly, if the rule of law protects "human dignity" to some extent, how can law - when it promotes despotism or oppression - be viewed as being an entirely amoral mechanism? What can one make of an argument which posits that there is no moral value in legal systems because the rule of law is a "negative"<sup>92</sup> value since "... conformity to it does not cause good except through avoiding evil, and the evil which is avoided is evil which could have only been caused by the law itself"?<sup>93</sup>

On balance, it is contended that Raz's argument must be supported because of his rather minimalist interpretation of the doctrine (ie "the law must be capable of guiding the behaviour of its subjects"<sup>94</sup>): no hostages are left to fortune. On this basis, it is possible to adopt a highly positivist view of the rule of law as being simply a political ideal for the law to aspire to, and law itself as an amoral entity. MacCormick's basic test of positivism - that "... the existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems"<sup>95</sup> - is passed without difficulty. A natural law position of the sort suggested by Fuller has not been adopted<sup>96</sup>.

It is very important to appreciate once again the point implicit in the works of

Dicey and Hayek, that legal systems (whether democratic or otherwise) which place great emphasis on the doctrine of the rule of law and its derivative principles should be viewed as being liberal systems, because they foster values which are central to liberalism: for example, the protection of the human dignity of individuals, individual freedom to plan in a stable legal environment, and the control of arbitrary power.<sup>97</sup>

Societies which place less emphasis on attaining the ideal of the rule of law and its derivative principles may therefore be viewed as placing less significance on liberal values. Accordingly, it is not being argued that law enacted by a regime which abuses the ideal of the rule of law by, for example, not having an independent judiciary is not law: it is simply not law which is in accordance with the rule of law, its derivative principles, and therefore liberal values. This highly positivist interpretation is therefore entirely consistent with what MacCormick calls the "... last resort sovereignty of the individual moral conscience, the right to criticise established law for its injustice as quite distinct from formal validity or invalidity, the right to weigh up the case for obedience and disobedience, the right and even the duty to disobey iniquity demanded in the name of the law."<sup>98</sup>

It can hopefully be appreciated without too much difficulty that in terms of the statement that "the rule of law is a political ideal which a legal system may possess to a greater or a lesser degree"<sup>99</sup>, the Scottish legal system adheres strongly to it. In this sense, the Scottish legal system may be viewed as being essentially liberal. Indeed, as was noted above, variations of the doctrine of the rule of law (as set out by Dicey and others) have had enormous constitutional and legal significance



throughout the United Kingdom.

It is readily apparent that the doctrine that the law "must be capable of guiding the behaviour of its subjects"<sup>100</sup>, and its main derivative principles, have been developed to a very high degree in Scotland<sup>101</sup>. For example, the institutions and conventions of the constitution place effective restraints on the ability of government to pass retrospective or arbitrary legislation<sup>102</sup>, there are sophisticated political and legal processes which provide for the application of natural justice when appropriate<sup>103</sup>, the courts have the power to review administrative decisions<sup>104</sup>, and the criminal law and law of evidence seeks to ensure that "the discretion of crime prevention agencies should not be allowed to pervert the rule of law."<sup>105</sup> However, most significantly, the independence of the judiciary is, for the most part, protected and guaranteed in order to prevent direct political interference in the court process<sup>106</sup>, which, under rule of law theory, is given a central role in ensuring a stable legal environment and the protection of the rule of law. Raz went as far as to comment that an independent judiciary is "essential for the preservation of the rule of law."<sup>107</sup> The fragility and significance of judicial independence is an important theme in this thesis.

Notwithstanding the cogency of his arguments, it is submitted that Raz's opinion that the rule of law should be viewed merely as being a "political ideal"<sup>108</sup> or the "inherent excellence"<sup>109</sup> of law requires further evaluation when consideration is being given to legal systems such as Scotland's, which adhere closely to it. Although it is certainly correct to use these descriptions in general terms, "developed" liberal systems of this type surely require more attention. The reason for this is as



follows. As indicated above, if Scotland is taken as an example of a developed liberal system, the "ideal" of the rule of law has, to a considerable extent, been realised<sup>110</sup>. Raz's focus on it as an efficiency or excellence promoting ideal, although correct, does not give full attention to the fact that its significance has become even greater<sup>111</sup>. It would, for example, be very difficult to imagine circumstances in Scotland where the importance of conformity to the rule of law and its derivative principles would be denied by the government, legislature or the courts. This is because they have to a very large extent shaped our constitutional traditions, legal institutions, and the way we are socialised into thinking about law and government: were they to be challenged or abused to any significant degree, it would indicate a significant cultural shift away from basic liberal values and institutions. Indeed, it is argued that, in a developed liberal society, the rule of law and its derivative principles can not only be viewed as representing powerful cultural assumptions of liberalism - they have actually become vital social institutions (eg the judiciary) and the foundation of law and the legal system<sup>112</sup>. Accordingly, it is argued that the rule of law and its derivative principles provide what can be called a "primary morality" for developed liberal legal systems. They are effectively the most significant internal criteria of validity for these systems. If they are inadequately adhered to, or have not become part of the constitutional culture so that the independence of the judiciary is not assured, then the legal system in question can be distinguished from a developed liberal system such as Scotland's.

It is recognised that the term "primary morality" might cause a degree of disquiet: are natural law arguments creeping in?<sup>113</sup> However, it is not used as a

philosophical term of art. The word "primary" is used to highlight the point that in developed liberal legal systems, the rule of law and its derivative principles have been assumed into the fabric of the legal system to the extent that they are accepted as being cultural truisms which have actually been translated into institutional and constitutional form. The term "morality" is used very generally to denote the idea that they are standards which are not only used to determine whether developments within a legal system should be viewed as being good or bad in an ideal sense, but which also pragmatically represent, promote and buttress basic moral values of liberalism.

It is contended that in developed liberal systems of law and government there is a cultural consensus that the rule of law and its derivative principles should be protected from pressures which could seriously destabilise them and therefore create a crisis for basic liberal values. In Scotland, it is the judiciary and the legislature who represent and promote this consensus most directly, although it is of great importance to all. Indeed, as indicated above, the independence of the judiciary is both a crucial indicator of the importance ascribed to the rule of law, and one of the main ways in which it is perpetuated.

Clearly, however, not all pressures on the rule of law are undesirable, as Raz pointed out in a memorable quote: "... the rule of law is meant to enable the law to promote social good ... Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty."<sup>114</sup> However, it is also contended that he was correct to note that "Conformity to the rule of law is a matter of degree, and though other things being equal, the greater the conformity the better - other things are rarely equal."<sup>115</sup> Accordingly, the consensus does not deny that the state should

suppress individual freedoms in the public interest: indeed, in a liberal democratic country such as Scotland, it is desirable that it should do so, as "social good"<sup>116</sup> is interpreted by elected Parliamentarians and jurisdictionally limited, independent judges.

It is intended to refer to this consensus as the "secondary morality" of developed liberal legal systems. Once again, any confusion with philosophical terms of art should be avoided. Very simply, it may be viewed as being "secondary" in the sense that it is a derivative of the rule of law and the main principles which develop from it. As before, "morality" is used to imply not merely an idealistic set of values and assumptions, but a more pragmatic, concrete entity, which has been assumed into the legal system.

Secondary morality has three basic inter-related qualities, which are referred to throughout the thesis. The first is what I have termed the "ethos" of secondary morality. This is comprised in the broadest possible sense of the traditional positivist model of law as an impartial instrument which can be used for enlightened or oppressive purposes. The ethos encompasses a wide range of cultural assumptions - from highly analytical theories which seek to establish law's autonomy from morality to simplistic "slot machine"<sup>117</sup> theories of justice. Under this interpretation, the traditional reluctance of Scottish judges to become involved in directly political matters in administrative law cases is simply a manifestation of this ethos: if law is an autonomous, impartial science, then it requires impartial, objective scientists to operate it. Accordingly, in very general terms, this ethos protects and promotes the rule of law and its most important derivative principle - judicial independence.

Viewed in this context, individual theories of analytical jurisprudence can be seen as being comparatively unimportant because they are largely inaccessible even to those who operate the legal system and who are the decision takers within it - never mind the ordinary citizen. What is significant about analytical jurisprudence is that for the most part it bolsters the positivist image of law as being autonomous and somehow scientific (with occasional exceptions such as Fuller<sup>118</sup>). It is submitted that the importance of the works of, for example, Hart or Kelsen is not the concept of the rule of recognition or pure law respectively<sup>119</sup>, as these are virtually meaningless outwith university jurisprudence departments. Instead it is the fact that these works buttress and confirm the primitive and unreflective positivism of generations of judges and lawyers, and the works of more accessible writers such as Dicey<sup>120</sup>. They do so by developing positivism, rather than denigrating it. Accordingly, it is argued that the main significance of analytical jurisprudence is not to be found in the intricacy of each differing theory, but the underlying cultural assumption which it supports - that the law should be viewed as being independent and autonomous from wider questions of morality or the political process.

The second quality is comprised of the "standards" of secondary morality. These provide general tests by which judicial conduct can be evaluated not only by judges themselves, but also by the wider public. If the standards are met, then judicial conduct is in accordance with the ethos of secondary morality. The most important standards are what can be called "ostensive judicial impartiality" and "ostensive judicial competence"<sup>121</sup>. Separate consideration should be given to each.

For as long as the judiciary is generally perceived as possessing ostensive

impartiality, then the ethos of secondary morality - that the law is a positivistic, structured and morally neutral entity - is buttressed. Ostensive impartiality requires not only that judges strive to present themselves as impartial, but that they are seen to be so.

However, if judges cease to be seen as being ostensively impartial, then in very little time indeed the law and legal system becomes viewed as little more than a biased, subjective lottery. The most obvious way in which ostensive impartiality is lost is by judges openly deciding cases in a biased and partial fashion, but allegations of bias can also arise more subtly by judges becoming involved as decision takers in areas requiring a "direct political involvement"<sup>122</sup>. In the administrative law context, the latter situation can come about in two ways. First, by judges extending their discretionary law making power in such a way that they precipitate a clash with the government (or local government) over who sets policy in strongly political issues. Second, by the legislature creating statutory powers which require judges to take decisions which might bring them into conflict with the policy implementation of an elected authority (eg a local authority).

It is important to recognise ostensive impartiality's role as guardian not only of the ethos of secondary morality, but of the rule of law. This is so for two reasons. First, if ostensive impartiality is lost, then the most important attribute of the rule of law - judicial independence - is destabilised. If judges are seen as being partial, then, in administrative law cases in particular, the perception that they are independent of the political process is put under intolerable strain. Eventually, the constitutional protections which safeguard judicial independence may become an

irrelevance<sup>123</sup>. Second, on a rather more subtle level, the loss of ostensive impartiality contributes to the degrading of the rule of law by making it more difficult for individuals to plan in a stable, reasonably certain legal framework. Obviously, if judges are likely to behave in an arbitrary, biased fashion (or if there is a perception that they may do so), then any certainty afforded by court based adjudication is lost. The importance of the standard of ostensive judicial impartiality is developed throughout the thesis.

The standard of ostensive judicial competence is closely related to ostensive impartiality, and its significance is particularly clear in administrative law. Competence is used in a broad sense to mean a test of whether it is appropriate for judicial adjudication to be utilised as a decision taking process: are judges competent decision takers in a particular area? Can the court properly assess all the relevant evidence, and take account of the consequences of its decisions? Have particular functions become anomalous or anachronistic? Fuller's arguments on polycentric decisions are clearly of considerable importance in determining not only whether judicial adjudication is a suitable process, but also whether it is seen to be appropriate. It is important that judges are not only competent decision takers in this respect but are also ostensibly competent because failure to maintain this standard can potentially have detrimental consequences for the ethos of secondary morality and therefore the rule of law. If judicial adjudication is carelessly utilised in areas with a strong polycentric effect, then it may be viewed as being an inefficient and weak decision taking process, which gives rise to uncertainty. This in turn makes it difficult for individuals to plan in a stable legal environment. In addition, confidence

in adjudication may be lost, and the judiciary may be criticised for the unforeseen effects of court decisions<sup>124</sup>. All of these potential consequences are detrimental to the ethos of secondary morality, which stresses the sophistication and efficiency of the legal process<sup>125</sup>, and the rule of law, which champions legal certainty and stability<sup>126</sup>. There would be a real danger of these difficulties arising either if judges expanded their powers, or if the legislature required them to exercise powers, in areas with a strong polycentric effect and "direct political involvement"<sup>127</sup>.

The third and final quality is made up of what can be called the "mechanisms"<sup>128</sup> of secondary morality. These provide the law and legal order with a process and rules which have developed over the centuries, and which can, no matter how artificially, claim to be "scientific". They are created by the judiciary and the legislature and have the effect of protecting the ethos and standards of secondary morality and therefore (albeit indirectly) the rule of law. Accordingly, strict legislative drafting, the canons of statutory interpretation, stare decisis, and the use of the Institutional Writers, may all be viewed as mechanisms<sup>129</sup>. Other common law developments, such as Lord Diplock's formulation of the grounds for judicial review of administrative action (ie illegality, irrationality and procedural impropriety<sup>130</sup>) can also be described in the same way.

To conclude this section, it is argued that, provided the rule of law is not used as a means of denying "major social goals"<sup>131</sup>, it provides an important and appropriate means of ensuring "efficient"<sup>132</sup> law. It may also be viewed, along with its derivative principles, as being of tremendous significance for the culture and institutions of developed liberal legal systems such as Scotland's. As such, it should



not be undermined without full consideration being given to the consequences of doing so.

### **Section Three: The Significance of Rule of Law Theory in Judicial Decision Taking**

With the above points in mind, it is submitted that the rule of law is not protected by the argument that British judges do not legislate, but by the premise that they seek to regulate their discretion to make law according to a justifiable process of decision taking. General discussion of this point is of considerable relevance in terms of establishing general principles for shrieval decision taking in local government.

The ethos of secondary morality requires not that judges do not become involved in political issues, but that their involvement is not direct<sup>133</sup>, and that it corresponds with what is justifiable according to a consensus on the limits of their power as determined by largely inchoate concepts of the constitution. This consensus is, in effect, the ethos of secondary morality, which is in turn maintained by its standards and mechanisms. This point was implied by MacCormick (although in a different context):

"In all cases, judicial discretion exists only within the framework of some predetermined standards. Where these standards are legal rules, the discretion exists only within a rather restricted field, although rarely eliminated completely. Where the rules give no guidance or give ambiguous guidance, recourse may be had to other standards. But since these standards are all less precise than rules, the discretion involved in interpreting and extrapolating from them is greater."<sup>134</sup>



It is therefore important to note that when judges rely on "standards of judgement"<sup>135</sup> which are not legal rules, they are still operating according to standards and mechanisms of secondary morality which restrict their discretion to make law. They seek to maintain both ostensive impartiality and competence, and therefore judicial independence: this in turn can be seen as protection of the rule of law. This tendency was illustrated by Lord Hailsham:

"A judge in Britain is hedged about by a far more restrictive view of precedent than they [foreign judges], and since most decisions nowadays consist in the interpretation and application of Acts of Parliament, it is even more important that the rules of construing Acts of Parliament followed by English and Scottish judges are far more rigid and limiting than any country in the world not operating the British system ... our traditional method of Parliamentary draftsmanship is so much more detailed than in any European country as to fetter judicial independence to an extent quite unparalleled elsewhere. Even on matters where we are wont to leave a question to a judge's discretion, his use of it is subject to the pyramidal system of appeal...."<sup>136</sup>

This is not to follow Dworkin's argument that there is a "right" answer for judges in "hard" cases which involve the exercise of discretion. That view, as MacCormick has made plain, cannot be sustained.<sup>137</sup> What is being argued is that there is a "right way" for judges to reach decisions, and that this provides the criteria for assessing the merits and demerits of individual decisions. This "right way" is determined by the obligations placed on judges by the ethos and standards of the secondary morality of law. Accordingly, what happens in a "hard"<sup>138</sup> case where

the rules have run out is that the judge is made particularly aware of the standards of the secondary morality of law, in that the various inconsistencies in his position as an impartial operator of the supposedly value free, efficient and autonomous mechanism of the law are shown in stark relief. The judge is exposed as a powerful decision taker in the political constitution. The "right way" for him to legitimise his position in the face of the potential for controversy arising out of the exercise of discretion is to manipulate the mechanisms of secondary morality in such a way as to protect its standards and ethos. Statutory interpretation and precedent should be utilised to avoid (in so far as is possible) the allegation that the judge is exercising a subjective discretion.

As argued above, it is by doing so that judges prevent destabilisation of the most important derivative principle of the rule of law - judicial independence. It is not of course being suggested that this is a distinct thought process which is used by the average Court of Session judge in a difficult judicial review, or a sheriff in a statutory appeal, although it is argued that it is this type of reasoning, however inchoate or unconscious, which directs judges in "hard" cases. Nor is it thought that vague concepts of the rule of law and secondary morality make decision taking easy - but they do draw together basic standards which makes it easier.

It is important to note that it is not only restrictions on judicial law making which protect the rule of law: the legislature must also place restrictions on itself. Parliament must ensure - for as long as it wishes to maintain the rule of law - that when allocating functions to the judiciary it does not involve them in areas of decision taking which require a "direct political involvement".<sup>139</sup> This could lead to a breach

of the standard of ostensive judicial impartiality. Similarly, the legislature should consider the question of whether a provision could be contrary to the standard of ostensive judicial competence. There must be an awareness of the importance of the ethos of secondary morality, together with an appreciation of the consequences of breaching its standards. For the most part, the legislature has shown itself to be sensitive to concerns of this nature, but there have been occasions when the judiciary has been allocated functions which are contrary to the ethos of secondary morality.

The Restrictive Practices Court of the 1960s provides a good example, although, as will become clear, many of the powers allocated to sheriffs can also be used as illustrations of this point.<sup>140</sup> The government sought to use the judiciary to decide on claims for exemptions from the ban on resale price maintenance, in order to divest itself of responsibility for difficult political decisions. As far as government ministers were concerned, this was an ideal solution.<sup>141</sup> However, it was considerably less satisfactory for those concerned with the legitimacy of the legal order, as Stevens made clear:

"... a lawyer must insist that the [use of] the court is an unsatisfactory compromise. In the first place, its operation involves the processes which are essentially alien to the judicial process, and therefore loses its advantages. Second, it imposes functions which are inconsistent with the traditional concept of responsible government; and thirdly, it unfairly exposes the judges to criticism."<sup>142</sup>

The dangers of this approach were made plain. Arguing that British judges have "obtained their present respect in society ... by carefully retreating from areas where overt policy questions were involved"<sup>143</sup>, he pointed out that there was a real

danger of constitutional "backfire"<sup>144</sup> resulting from poorly conceived legislation which involved judges in the political arena. Lord Devlin (who was chairman of the court) made this point very clearly in "Judges and Lawmakers"<sup>145</sup>. Despite the rather flowery nature of his prose, it is contended that he was correct to argue that "... the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it. This is a danger about which the judiciary has been too easy going."<sup>146</sup>

In accordance with the views developed above in respect of judicial law making, it is argued that this type of legislation should be viewed as being anomalous and therefore undesirable in a political constitution which seeks to uphold the rule of law.

#### **Section Four: Conclusion**

Judicial decision taking (whether under common law or statute) in areas with the potential for "direct political involvement"<sup>147</sup> is an observable phenomenon which operates according to a consensus of what is constitutionally appropriate.

In Scotland, the positivist ethos of secondary morality - that the law is independent and autonomous from wider questions of morality or the political process - is the dominant consensus. It is protected by the maintenance of the standards and mechanisms of secondary morality. In its turn it safeguards judicial independence and therefore the rule of law, which is an important foundation of liberal society. The answer to the question of whether the concept of the rule of law is of such significance that it must be protected from destabilisation is, for this writer, to be

given in the affirmative.

To conclude, it is submitted that general principles for the evaluation and allocation of the sheriff's powers in local administration can and should be constructed in the context of this analysis. The implications for the rule of law of inconsistent judicial decision taking or inappropriate legislation involving the judiciary are particularly clear in administrative law and should be highlighted. The significance of this approach is developed throughout the thesis.

## **Chapter Two: General Principles for the Allocation of Statutory Decision Taking Functions to Judicial Officers**

### **Introduction**

The purpose of this chapter is to set out "general principles" for the allocation of statutory decision-taking functions to judicial officers of the sort envisaged by the Scottish Law Commission's memorandum as quoted in the introductory chapter.<sup>1</sup> Further general principles are suggested for their exercise. Once articulated, they can be used as a theoretical base from which both the historical development of the sheriff's jurisdiction in local administration and current powers can be criticised: future developments can also be suggested.

It is recognised that it is usually the case that general principles emerge in a gradual, ad hoc fashion. This is in part a reflection of the primarily inductive and empiricist tradition of common law theory,<sup>2</sup> which has permeated UK administrative law. However, it is intended to proceed on the basis of the Scottish tradition of legal development by deductive thought.<sup>3</sup> This requires general principles to be established at the beginning of any study, rather than at the end - in general terms, a conceptualist approach.<sup>4</sup>

The general principles set out in this thesis are based on the arguments advanced in the preceding chapter concerning the rule of law, secondary morality and the role of adjudication. It was argued that the responsibility for protecting the rule of law falls mainly on two groups: the legislature and the judiciary. Of the two, the responsibility of the judiciary to the rule of law is more direct, as their independence is its most significant feature. However, the legislature also has an important responsibility to the rule of law, for if it undermines the independence or

functional competence of the legal order in legislation, the courts may eventually no longer be able to embody and uphold the ethos and standards of secondary morality: the independence of the judiciary, the integrity of adjudication, and therefore the rule of law may then be compromised. If the rule of law is destabilised, then individualism and basic liberal society may be destabilised as well.<sup>5</sup>

Accordingly, in constructing general principles for the allocation and application of statutory decision-taking functions, it is intended to set out two sets of principles: one for the legislature, and one for the judiciary.

### **Section One: General Principles for Legislation**

It is assumed in constructing "general principles" that any British (or future Scottish) legislature would always seek to preserve the rule of law, although quite clearly the emphasis given to it when pursuing "social goals"<sup>6</sup> may vary. In simple terms, it is contended that, when legislating, any Parliament must give consideration to where the balance between the potentially conflicting interests of the rule of law and social policy goals lies.<sup>7</sup> This is clearly a subjective area, but the democratic mandate of the legislature provides the legitimacy for decisions of this sort to be taken.<sup>8</sup> Two general principles can be suggested. If they are thought to be naive or strikingly obvious, it should be appreciated that the legislature frequently appears not to have given them serious consideration when legislating for the sheriff in Scottish local administration.

(i) First, when the legislature is creating powers for members of the judiciary to take decisions, or resolve disputes, there should be an increased awareness that

important issues have been introduced, by virtue of the judiciary's special status in rule of law theory. As indicated above, if the judiciary and legal process are given powers which by their very nature are contrary to the standard of ostensive judicial impartiality, there is a danger that, by virtue of the denial of the ethos of secondary morality, the rule of law may be destabilised. In the administrative law context, for the legislature to require the judiciary to take direct policy judgments - what has been termed a "direct political involvement"<sup>9</sup> - is potentially dangerous. Once judges are involved in taking this type of decision, it becomes very difficult for them to operate according to the positivist ethos of the secondary morality of law: that is, it becomes more difficult for them to present themselves as ostensibly impartial decision takers. The Restrictive Practices Court mentioned in chapter one provides an example of this.<sup>10</sup> The result of this process may be a loss of confidence in the judiciary, or a constitutional clash between elected authorities and the judiciary which could cause a destabilisation of judicial independence and therefore the rule of law.

In creating statutory decision-taking powers for the judiciary in areas which have the potential for a "direct political involvement", it is therefore vital that the legislature shows an awareness of the importance of maintaining the standard of ostensive judicial impartiality, and the consequences of failing to do so. There should be a clear understanding that, when allocating functions to the judiciary, the integrity of liberal society is, however indirectly, at stake. It is not overly dramatic to express matters in such terms. Perhaps it is only in the United Kingdom, where there is no written constitution to emphasise the importance of maintaining a separation of powers, that the expression of such a fundamental tenet of liberalism could seem to



be so.

Accordingly, within the administrative law context, a responsible legislature should strive to operate according to the "general principle" that the judiciary should not become directly involved in the evaluation of the policies of elected authorities.<sup>11</sup> If statutory provision for judicial involvement in the business of elected authorities is deemed necessary, it should be constructed in such a way that the judiciary can operate as far as possible according to the ethos of the secondary morality of law. Legislation should protect ostensive judicial impartiality by not allocating to judges powers which could potentially result in "direct political involvement", without first ensuring that their jurisdiction is limited to areas which are appropriate for judicial intervention.

It should be noted that it is not being argued that the courts should never be able to review the decisions of elected public authorities. Clearly, there are areas of administrative decision taking where it is entirely justifiable for the court to exercise strong powers of review. For example, sheriffs have a wide jurisdiction in cases involving decisions by regional or islands councils to assume parental rights, and few doubt their suitability as decision takers in this type of case. However, it is important to note that in decisions of this sort the degree of "direct political involvement" is not high. The cases involve individual applications concerning the well-being of children, and the political content of the decision is low.<sup>12</sup>

In other areas which have a high political content, it is recognised that can be desirable for judges to exercise powers of review<sup>13</sup> when there is a requirement for legally skilled, ostensibly impartial and authoritative decision taking: for example,

determining whether there have been breaches of natural justice, error in law or capricious or arbitrary decision taking.<sup>14</sup> Whilst it must be recognised that operating in these areas can give rise to concern for ostensive impartiality because of the potential for the direct involvement of judges in the determination of policy issues, the likelihood of this type of dislocation can be limited by imaginative legislative drafting (as in some appeals to the sheriff)<sup>15</sup> and careful judicial decision taking (as in common law judicial review).<sup>16</sup>

(ii) The second inter-related general principle concerns the utility and appropriateness of adjudication. The legislature must show an awareness of the point that adjudication (and court-based adjudication in particular) has, as a decision-taking process, a number of serious limitations. By its nature, court based adjudication tends to operate best when it is utilised as a means of resolving disputes between individuals (whether juristic or otherwise) which are focused on straight law/fact determinations with a low polycentric content.<sup>17</sup> The adjudicatory process can be a highly effective means of eliciting and evaluating large amounts of complex evidence in this type of dispute. Notwithstanding this, it has disadvantages. It is, for example, inherently time consuming and expensive.<sup>18</sup> There may be problems with the evaluation and comprehension of evidence<sup>19</sup>; adjudication is also retrospective.<sup>20</sup> Others have argued that, as the adjudicatory process is controlled by the legal profession, it is directed towards the furthering of professional (and personal) interests, rather than those of individual litigants.<sup>21</sup> There is undoubtedly much truth in these and other assertions. However, it is contended that even when the disadvantages and problems of the adjudicatory process have been admitted, it is still the one of the most effective

means of resolving weighty disputes between individuals, and protecting the rights of individuals: its continued worth and relevance can be clearly illustrated by the value that is still placed in it, and the high standards expected of it.<sup>22</sup>

The fact that court based adjudication is viewed as embodying an ideal standard of thoroughness, impartiality and integrity in decision-taking in individualised disputes is an important reason in itself why any legislature should ensure that there is public confidence that it will meet these standards. It can only do so if it is allocated an appropriate functional role. As with any other decision-taking process, court based adjudication loses credibility if it is utilised for purposes to which it is unsuited.<sup>23</sup>

In the administrative law context, the most obvious point is that the court process is an unsuitable means of evaluating, reviewing or taking policy decisions. As discussed in the preceding chapter, Fuller argued that the more "polycentric" a problem becomes, the less suitable adjudication is as a means of resolving it.<sup>24</sup> Accordingly, the question of whether or not a statutory decision-taking power should be allocated to a court based adjudicator (such as a sheriff), or an administrative decision-taker (such as the Secretary of State for Scotland or a local authority), can be approached by the legislature on the basis that the more the decision taking process is focused on law/fact determinations which have serious consequences for the interests of individuals and a low polycentric effect, then the greater the requirement for court based adjudication.<sup>25</sup> Broader decisions, which place more emphasis on policy considerations, and which have a stronger polycentric effect, require allocation to decision takers such as tribunals, government ministers, local authorities or public

servants. These different types of function are not rigidly segregated, but should be viewed as being on a "spectrum" of decision taking.<sup>26</sup> At one end of the spectrum, there are functions which, for the reasons noted above, are best suited for court based adjudication. As the weight given to the interests of the individual fade, these shade into functions which may require adjudication, but not the "ideal type" court based variety<sup>27</sup>; and these in turn fade into those which are not amenable to adjudication at all.

The consequences of the legislature choosing to allocate to the court powers which it is functionally ill-equipped to deal with are not difficult to identify: confidence in the process of court based adjudication may be lost, which in turn may impact on the standard of ostensive judicial competence. If judges are unable to evaluate the polycentric implications of their decision because the adjudicatory process prevents them from doing so effectively, it is likely that unforeseen policy implications will arise, which may eventually call into question the efficiency and utility of the court.<sup>28</sup> The continuation of powers and functions which are anachronistic or anomalous may also have the same result, a point which is developed at length in subsequent discussion.<sup>29</sup> If adjudication is thought to create uncertainty and confusion, then it is contrary to the underlying assumption of the rule of law, which is to enable individuals to plan within a stable legal environment.<sup>30</sup>

Accordingly, as a general principle, it is argued that legislators should resist the temptation to off-load difficult polycentric decisions on to the adjudicatory process, or to continue anachronistic or anomalous provisions, if the result is likely to be criticism of the legal process.

(iii) There are of course other factors which any legislature has to consider when allocating functions: cost, access for parties (both physical and procedural), the desirability of formality, and existing workloads. These can be important in deciding whether court based adjudication is a suitable option, rather than adjudication by a tribunal, or other forms of decision taking.<sup>31</sup> However, it is submitted that these factors should be seen as being secondary considerations to the general principles sketched out above.

## **Section Two: General Principles for the Exercise of Statutory Powers by the Judiciary**

In a broad sense, the "general principles" which guide the judiciary in the exercise of statutory decision-taking powers have already been set out in the discussion of the ethos, standards and mechanisms of secondary morality.

For example, the standard treatment of statutory interpretation supports the positivistic view of the judge as the impartial "scientific" interpreter of the will of Parliament, which is a manifestation of the ethos of secondary morality.<sup>32</sup> Leaving aside the intellectual flaw in the argument that a collective body such as Parliament can have a single will<sup>33</sup>, it is argued that the "rules" of interpretation, along with stare decisis, and the Institutional Writers, can be viewed as mechanisms for structuring judicial decision taking in accordance with the standards of the secondary morality of law.<sup>34</sup> As long as judges do not abuse their discretion, they are protected (in so far as is possible) from the charge that they are exercising a subjective law-making power.<sup>35</sup> Whilst it may be conceded that they are legislating, it is also possible to argue that they are doing so within a highly restricted remit which is based

on rules.<sup>36</sup> In the final analysis, this provides the means by which the judiciary can protect the positivist ethos of secondary morality. This is required to enable the legal order to maintain stability in the rule of law.

Clearly, as indicated above, the legislature can make it difficult for the judiciary to operate the mechanisms of secondary morality, in that it can create rules which provide for judicial decision taking in areas with a "direct political involvement" without limiting the judicial remit in a way which corresponds with the requirements of ostensive judicial impartiality and competence. There are, as indicated in the introductory chapter, a number of appeals which put the sheriff in this position.<sup>37</sup> In "hard"<sup>38</sup> cases of this type the judge's own law-making capacity is exposed. How can the court defuse the potential for the denigration of the standards of secondary morality, and its ethos? General principles are suggested.

(i) The first responsibility of the judiciary must always be to give effect to Parliamentary intent as expressed in statute. Where there is no clear indication of the judicial remit (as in the majority of appeals to the sheriff concerning local administration)<sup>39</sup>, judges must, as a general principle, recognise that they have a further responsibility, when exercising their statutory discretion, to the rule of law, and to the maintenance of the ethos and standards of secondary morality. This is particularly so when judges are operating in areas which require a strong "direct political involvement". For example, in cases where the court is required to make a direct evaluation of ministerial or local authority policy based decisions, without statutory limitations on their powers<sup>40</sup>, judges must show an awareness of the potential dangers for the rule of law which could arise from their decisions. It is

submitted that, in cases of the sort mentioned above, judges must "retreat" into the ethos of secondary morality, and seek to uphold the two standards of ostensive judicial impartiality and competence. The reason for this is comparatively simple. If they were to adopt a pro-active approach to law making, and promoted what could be interpreted as direct, subjective policy decisions, the potential for an inappropriate level of involvement in policy making is clear, and, pursuant to this, the likelihood of the denegation of the above standards. From the standpoint adopted in this thesis, this may be seen as being a hazardous and undesirable course of action. It is recognised that controversy will frequently arise from judicial decisions<sup>41</sup> - however, controversy which is likely to damage the standards and ethos of secondary morality (and therefore, indirectly, the rule of law) because of the degree of "direct political involvement" should be minimised whenever possible.

Naturally, the court must also ensure that it is not put in the position where it can be accused of attempting to obstruct the legislature. There should be, as Lord Diplock has suggested, "a purposive approach to the Act as a whole to ascertain the social end it was intended to achieve and the practical means by which it was expected to achieve them"<sup>42</sup> - but this must be tempered by a feeling of obligation to the rule of law and secondary morality. It is vital in "hard" cases with the potential for a strong "direct political involvement" that judges strike the right balance between "retreating" to secondary morality, and taking a more pro-active approach to policy making. Accordingly, judges should weigh the desirability of narrowing what may appear to be the intention of the legislature to involve the judiciary in policy merits (ie "retreating" to secondary morality), against what may be perceived to be the





advantages of taking a pro-active, "dynamic" approach to the interpretation of their powers.<sup>43</sup> In general terms, the former protects the ethos and standards of the secondary morality and buttresses the rule of law, whereas the latter may appear to provide for substantive fairness for individual appellants, but may in the long term cause instability and uncertainty. The judiciary must always show an awareness of the dangers for the rule of law of falling towards either extreme.<sup>44</sup> As a general principle, it is contended that, based on the arguments presented above and in chapter one, it is usually desirable for the judiciary to "retreat" to the former.

(ii) As a second derivative general principle, it is submitted that judges should ensure that their position is protected from the suggestion that they have either breached ostensive impartiality and/or competence, or acted contrary to the intention of Parliament, by utilising the mechanisms of secondary morality in a way which promotes ostensive judicial impartiality and competence.

It should always be possible to view a judicial decision as being a reasonable exercise of the discretion afforded to judges under the "rules" of statutory interpretation, stare decisis, and the conventions of judicial reasoning. The conscientious and bona fide use of the mechanisms of secondary morality is not irrelevant as a means of upholding the rule of law and ostensive impartiality: they discipline judges by restricting their discretion, and they also protect the judiciary and adjudication from criticism by providing judges with a justifiable and structured system with which to present the reasons for their decisions.<sup>45</sup>

It is comparatively easy to identify judicial decisions where the judge has conducted himself in such a way as to invite criticism by, for example, making



eclectic use of legal sources. The judge's failure to provide justifiable reasons for a decision using the mechanisms of secondary morality is exposed. Lord Denning's judgement in Mandla v. Dowall Lee<sup>46</sup> can be cited as an example: his approach clearly caused difficulties for the standard of ostensive impartiality in that his objectivity was effectively doubted in a powerful House of Lords decision.

#### 4. Conclusion

It should not be thought that there is any doubt that "general principles", no matter how general, would count for little if they hampered the policy implementation of any British government. This does not, however, mean that to make suggestions concerning the allocation of functions to judicial officers is a pointless exercise: the rule of law is of such constitutional importance that Parliament should be in no doubt as to the potential damage which can arise from ill considered legislation involving the court, and the judiciary should be reminded of its responsibility to it. Discussion has so far been centred around primarily theoretical considerations. Where does the Scottish sheriff fit in? The subsequent chapters will illustrate the relevance and significance of both "general principles" and conceptual issues for the evaluation of the sheriff's role in local administration.

**Part Two****Chapter Three: Introduction - The Value of Legal History**

Although there are many works on constitutional history<sup>1</sup>, the main administrative law textbooks give little attention to tracing the law's historical development. This is perhaps not very surprising, as the traditional approach of British academic lawyers in this field has been to separate the law from the wider context of politics and morality, and to focus on constitutional theory, the courts and precedent.<sup>2</sup> The study of British administrative law has therefore often been distinguished from socio-legal questions of how the law and legal process has traditionally functioned as part of the system of government.<sup>3</sup> However, in a broad sense, these factors can be viewed as being within the ambit of legal history, and studying them in tandem with more traditional case and statute based legal research can tell us much more than "this is how we got to where we are now", although this in itself is useful. Legal history can also give a deeper understanding of the dynamics of the legal process, and how, on the basis of previous experience, the law is likely to develop in the future. It can show how and why ideas and arguments have developed, and encourages a more informed appreciation of why current law might be thought to be inconsistent or anomalous. In short, legal history enables us to develop perspective.

Accordingly, it is intended to give considerable attention to the historical development of the sheriff's powers in local administration. The main reasons for doing so are uncomplicated. First, there is a considerable degree of confusion and uncertainty surrounding the sheriff's current jurisdiction.<sup>4</sup> Coverage of its historical

development should go some way towards dispelling this confusion. Second, the sheriff's powers are frequently upheld because they are thought, often on the basis of rather glib interpretations, to derive from a venerable historical jurisdiction<sup>5</sup>: the accuracy of these assertions should be tested. Third, many of the leading authorities relied on as precedent are comparatively old<sup>6</sup>: their relevance can only be properly evaluated if they are set in their historical context. This enables full appreciation of the inconsistencies and anomalies which create confusion in the modern jurisdiction. Fourth, tracing the development of substantive powers is an important part of the process of categorising the current jurisdiction, which is a central aim of this thesis.<sup>7</sup> In so doing, it is possible to identify different styles of provision, and to develop an understanding of why they were introduced - this again helps to identify present day anomalies. Finally, discussion of the way in which the sheriff's powers in local administration have been interpreted by the court over the years provides the opportunity to expand on the rule of law theory and general principles which were introduced in part one of the thesis.

Before launching into a discussion of the historical development of the sheriff's powers, some thought should be given to the potential pitfalls of historical research from the standpoint of an administrative lawyer. It is all too often the case that in writing legal history, lawyers make fundamental errors in historical technique. The most common error is that of unwittingly judging the past according to the standards of the present, which, to the professional historian, is anathema, as it inevitably leads to a flawed interpretation. A good example of this tendency can be found in Lord President Cooper's branding of the period 1350 to 1650 as the "Dark Age of Scottish

Legal History": more recent researchers have exposed the limitations of this approach, and, with the benefit of hindsight, it can be appreciated that his analysis is open to criticism.<sup>8</sup>

The rather more enlightened approach of Darnton<sup>9</sup> has been adapted for the purposes of this thesis. Darnton exhorts the historian to "discover the social dimension of thought and to tease meaning from documents by relating them to the surrounding world of significance, passing from text to context and back again until he [i.e. the historian] has cleared a way through a foreign mental world".<sup>10</sup> For as long as it is recognised that our perceptions of, "meanings" and "surrounding worlds of significance" are our own perceptions of the historical actors' perceptions, reached by an intellectual process peculiar to ourselves and our situation, we are not wasting time. We can never experience the past - we can only develop our own understanding of it. If we recognise the weaknesses which are inherent in our reasoning process, take account of the reliable material, and can stimulate some understanding of our present context, then historical research is a valuable exercise. Tracing the historical development of the sheriff's powers in local administration is approached with these points in mind.

Following on from the above comments, discussion is not limited to a "black letter law" interpretation of the development of the sheriff's statutory powers: it is also attempted to blend consideration of the wider socio-legal context in which sheriffs operated with that of precedent and administrative law theory. This then leads into the subsequent evaluation of current material and the analytical framework of statutory powers which is set out in part three of the thesis.

The historical chapters are arranged as follows. Chapter four provides a very brief synopsis of the sheriff's role in local administration prior to the Heritable Jurisdictions (Scotland) Act 1747, which was an important historical "watershed". Chapter five covers the important developments of the period 1747-1870. Chapter six considers subsequent changes in the sheriff's jurisdiction and the wider context of local administration in the period 1870-1930, and chapter seven covers the period 1930-1967. The dates have not been chosen at random: as will become apparent, they mark important changes, either within the sheriff's jurisdiction, or in Scottish local administration generally.

## **Chapter Four: A Brief Synopsis of the Sheriff's Powers in Local Administration**

### **Prior to 1747**

For reasons of space, it is not intended to give a great deal of attention to the period prior to 1747, although it should be noted that the medieval origins of the sheriff are of some relevance in terms of explaining the remarkable range of the modern sheriff's jurisdiction in local administration.

That the history of the office of sheriff in Scotland is both long and varied should be appreciated at the outset. The sheriff would appear to have been a Norman importation of King David I (1124-53)<sup>1</sup>. The medieval sheriff was a Royal executive officer, as well as a judge, with an important "governmental"<sup>2</sup> role. The term "governmental" is used to describe military, fiscal and executive powers held in local administration. The centre of power was the local Royal castle - in feudal theory an important symbol of Royal authority.<sup>3</sup> In England, no doubt the source of King David's inspiration, the sheriff was a reasonably effective means of extending and maintaining Royal influence.<sup>4</sup> The Scottish experience was, however, to be different, reflecting the cultural, geographical and later religious divisions in the Kingdom, as well as a relative shortage of Royal funds. The office of sheriff became part of the feudal powers held by the nobility, and the administration of the King's desmeigne suffered accordingly. The title, and the power it conferred, was normally granted "in fee and heritage", and fell within the feudal gift of local nobles, despite ineffectual attempts by the Crown to reimpose Royal authority.<sup>5</sup> As heritable property, the office of sheriff could be bought and sold. The records disclose that the last such transactions were in the early 18th century.<sup>6</sup>

The governmental duties of the medieval sheriff can be summarised as follows. As the military officer of his sherrifdom, he was responsible for quelling or pre-empting disturbances, conducting the local "wappinschaws", and maintaining the upkeep of the Royal castle. Other important duties included the serving of Royal briefes, the execution of Royal writs and letters, and the public proclamation of Royal announcements. The sheriff was also the local fiscal officer of the Crown, and "collected and accounted for every branch of the Royal revenue".<sup>7</sup> Sheriffs were not greatly remunerated for their services, but the wide ranging nature of their power provided ample opportunity for corruption and intrigue. Malcolm records that the overall picture is one of maladministration, greed and abuse of power: "... official records disclose the majority of sheriffs as negligent in their duties - failing to collect royal dues, or to account for those they had collected; given to exacting exorbitant fees from the lieges; to accepting bribes and giving unjust awards."<sup>8</sup>

To aid them in their duties and to improve standards, sheriffs were required by a statute of 1357 to appoint deputies: many ignored this requirement, and it would appear that the quality of many of the deputies was often no better than that of their superiors.<sup>9</sup>

Similar attempts by the Crown to improve the quality of shrieval administration over the centuries were equally unsuccessful. The nobility was always powerful enough to resist unwelcome changes and distance made it practically impossible for the Crown, weak as it frequently was, to enforce and supervise the proper exercise of duty. Various attempts were made to reform the heritable jurisdiction of the sheriffs, but largely to no avail: to abolish them in order to re-impose Royal

authority would have been costly in both political and financial terms. In any case, the monarchy was committed to the concept of government by feudal patronage, and sought to manipulate the system to its advantage by seeking the appointment of sheriffs loyal to the Royal cause. This was understandable, as the combination of governmental and judicial powers that went with office meant that the sheriffs were in an ideal position to ensure that the enemies of the Crown were monitored and controlled.<sup>10</sup>

For example, the activities of Claverhouse, Viscount Dundee, give an indication of the importance and power of the office of sheriff for the Crown in the late 17th century. The office was, even at this comparatively late stage, still a feudal appointment founded on Royal patronage. Claverhouse had no legal skills, and his duty as Sheriff of Wigtonshire was to put down covenanting unrest by force of arms in the field of battle as well as in the local courthouse. In the course of his period in office, he earned the soubriquet of "Bluidy Clavers" (an alternative to "Bonnie Dundee") on account of the zeal with which he went about his duties during "the killing time".<sup>11</sup>

The Union agreement with England in 1707 saw little change in the system. Article XX of the Treaty of Union, as subsequently ratified by the Union with England Act 1706, provided for the continuance of the heritable jurisdiction of the sheriff:

"... all Heritable Offices, Superiorities, Heritable Jurisdictions, Offices for Life, and Jurisdictions for Life, be reserved to the owners thereof, as Rights of Property in the same manner as they are now enjoyed by the Laws of Scotland".<sup>12</sup>



The new Parliament of Great Britain, dominated by English members, was naturally not an enthusiastic reformer of Scottish local administration, especially when large sums of money would have been required to compensate those holding heritable office if their powers were to be taken back by the Crown. It is quite possible that there was a general lack of interest in the jurisdiction held by Scottish sheriffs.<sup>13</sup> It is also likely that there would have been no impetus for reform of the heritable jurisdictions (in particular because they were protected by the Union agreement) had it not been for the spectacular failure of government and administration during the 1745 Rebellion. The Rebellion focused government attention on the inefficiency of Scottish local administration, and on the potential power held by officers such as sheriffs, should they prove to be disloyal to the Protestant Crown and Westminster parliament.<sup>14</sup> The office of sheriff was to be one of the main targets for reform in the brutal aftermath of failed rebellion.

To conclude this synopsis, a number of points should be noted. The period up to 1747 saw remarkably little change in the nature of the office of sheriff. Sheriffs were important Crown officials, with wide ranging powers, which involved them in the most important areas of secular administration. There was no concept of the separation of powers in operation.<sup>15</sup> The sheriff was not a product of the post reformation Scottish "enlightenment"<sup>16</sup>, but of the medieval feudal system. As such, there was nothing incongruous in the holder of office possessing wide judicial and governmental powers by virtue of hereditary right and Royal patronage.

## Chapter Five: The Sheriff's Jurisdiction in the Eighteenth and Nineteenth Centuries

### Introduction

This chapter covers the period 1747 to circa 1870, and is divided into four sections. The first explores the socio-legal context within which the substantive law operated up to the 1868 Commission on the Courts. Attention is given to the changes brought about by the Heritable Jurisdictions (Scotland) Act 1747, and the subsequent disputes between sheriffs over professional status and the allocation of duties. This is because this was the only context within which the sheriff's powers in local administration were discussed in any detail (other than in reported decisions). The second section examines the attempts made by the court in reported decisions to evaluate and categorise the sheriff's statutory powers. These are in turn assessed in the light of the general principles and rule of law theory set out in part one of the thesis. The third section provides a general discussion of the subject matter of the powers which constituted the sheriff's jurisdiction in the period under consideration. The continuation of the range of functions held by the feudal sheriffs and the way in which they were developed in the eighteenth and nineteenth centuries is noted. This is a particularly worthwhile exercise, because, given that many extant powers have their origins in this period, it lays the foundations of the argument that much of the sheriff's current jurisdiction is anachronistic. Finally, a brief summary draws together the main arguments and points of interest.

Before commencing, it should be noted that in section one, the powers in local administration are loosely described as governmental or judicial. No special

theoretical significance should be attached to either term at this stage. Accordingly, governmental is used simply to indicate that the power in question derives from the "ministerial" or executive powers traditionally held by the medieval sheriffs, whereas judicial denotes any other type of function. The nature of these distinctions is, however, considered in rather more depth in section two.

### **Section One: Developments in the Sheriff's Powers from 1747 to the 1870s**

Important changes were brought about by the Heritable Jurisdictions (Scotland) Act 1747, which came into effect on the 25th March 1748<sup>1</sup>:

"Be it enacted by the King's most excellent Majesty and by and with the advice and consent of the Lords Spiritual and Temporal. and commons, in this present Parliament assembled, and by the authority of the same, that all the heritable jurisdictions of justiciary, and all regalities and heritable baileries and all heritable constabularies other than the office of High Constable of Scotland ... shall be and are ... abrogated, taken away and hereby totally dissolved and extinguished."<sup>2</sup>

As indicated in the previous chapter, it took Rebellion to force the demise of the ancient heritable jurisdictions of Scotland. The Act of 1747 revested the authority of the heritable office of sheriff in the sheriff court<sup>3</sup> and went on to make special provision for the administration of the Scottish counties by sheriffs who did not hold office by virtue of hereditary right, but by Royal appointment. Importantly, while extensive provision was made for the creation of High Sheriffs<sup>4</sup>, who held office for one year only, no attempt was made to appoint any, presumably for political reasons. Some of their governmental duties were informally adopted by the Lords Lieutenant.

However, the post-1747 sheriffs depute, assisted by sheriff substitutes, took on most of the burdens of office.<sup>5</sup> The range of powers held by the reformed sheriffs remained virtually as wide as it had been prior to the Heritable Jurisdictions Act.<sup>6</sup>

The Act also formally introduced the requirement that to be eligible for appointment as sheriff depute, legal qualification was required. Sheriffs depute were to be advocates of at least three years standing.<sup>7</sup> They were "nominated and appointed by his Majesty"<sup>8</sup>, and were required to be resident in their sheriffdom for at least four months each year.<sup>9</sup> Holding office disqualified the deputies from accepting any other position, although they were permitted to continue practice at the Court of Session bar.<sup>10</sup> Sheriffs depute held office ad vitam aut culpam from 1768.<sup>11</sup> These developments were significant, in that they brought the sheriffs' powers in local administration, along with criminal and civil judicial duties, under the full control of the legal profession for the first time, a point which has not been fully appreciated by historians such as Whetstone. The eventual result of this was the dominance of the values and norms of professional lawyers not only in the courtroom, but in the discharge of governmental powers. Of particular interest is the adoption of an adjudicatory, largely adversarial style of decision taking in the jurisdiction within local administration, a feature which is considered below.<sup>12</sup>

Interestingly, however, there is some evidence implying that the legally qualified sheriffs depute were not to take on anything more than the civil and criminal jurisdictions of the old heritable sheriffs, suggesting that it may have been intended to effect a more rigorous separation of the judicial from the governmental<sup>13</sup>. Writing immediately after the passing of the 1747 Act, Bankton noted that the "Sheriff

Principal [ie High Sheriff] cannot act in a judicial capacity, the whole power being lodged in the sheriff depute."<sup>14</sup> This could be taken to imply that Bankton also thought that the ministerial powers of the heritable sheriffs were to be lodged with the High Sheriffs, with the legally qualified sheriffs depute dealing with "judicial" business in the sheriff courts. This impression is supported to some extent by the Act itself, which states that "... it shall not be lawful for any High Sheriff, or Stewart in Scotland, personally to judge in any cause, Civil or Criminal ...."<sup>15</sup> However, any such interpretation is merely conjectural, and, as indicated above, matters did not turn out as Bankton had envisaged.

It should not be thought that the changes of 1747 were a complete break with the past. In many respects, the Act built upon what had gone before. As noted in the previous chapter, deutes had been appointed since 1357<sup>16</sup>, and they had appointed substitutes to deal with less complicated cases<sup>17</sup> (although pre-reform deutes had not always been legally qualified). In addition, although post-1747 sheriffs were in theory appointed by the Crown, and this was an important symbol of the revesting of the jurisdiction by Royal authority, the reality was that the patronage of the nobility was required to secure appointment.<sup>18</sup> The position of the Faculty of Advocates as a "stable" from which socially acceptable, comparatively well educated and politically reliable candidates could be picked should not be underestimated throughout the eighteenth and nineteenth centuries.<sup>19</sup> However, as Whetstone has noted, in the period immediately following the passing of the Act, professional attainment would not appear to have been the highest priority as a criterion for appointment, and membership of the Faculty was easily attained.<sup>20</sup>

The mood of government changed in the late eighteenth century. Attempts were made to create a more efficient system which rewarded those who had distinguished themselves in practice at the bar.<sup>21</sup> As a result, the office of sheriff depute became a genteel staging post for those who were thought to be suitable candidates for the Court of Session bench. The majority of deputes remained in Edinburgh, neglecting even the four month rule, which had required their presence in their Sheriffdoms for at least part of the year.<sup>22</sup> It is not difficult to appreciate why - distances were great, work at the Bar distracting, and remuneration for the office poor. Most of the work, of both a judicial and governmental nature, was performed by the locally based sheriff substitutes. The deputes dealt with matters by post (evidence in both civil and criminal business could be presented in writing), and increasingly came to exercise a rather remote appellate jurisdiction, which was itself to become a source of controversy.<sup>23</sup> Writing in 1824, Robert Clark implied that this process was well established: "The sheriffs depute being now uniformly nominated from that illustrious body, the Faculty of Advocates, and frequently not allied to the county to which they are appointed, there is little or no hazard of their violating either of those moral or legal principles, which ought to encircle the brows of every upright and independent judge."<sup>24</sup>

The system of the locally based sheriff substitute performing the "laborious part"<sup>25</sup> of the business of the sheriff depute, whilst the Edinburgh based depute enjoyed a position of status and authority in county affairs, was to cause a considerable degree of acrimony until the 1970s, when both offices were reformed.<sup>26</sup> The at times heated debate between deputes and substitutes is of considerable

contextual relevance to the way in which the powers of the sheriff in local administration were viewed, as both groups used them as a means of justifying their respective positions: the deutes were concerned to maintain their influence and prestige in the counties, whereas the substitutes sought an improvement in status at their superiors' expense. As will become clear, this debate was virtually the only context in which the powers in local administration were discussed by sheriffs outwith reported decisions. Indeed, it seems to have overshadowed any questions as to the suitability of legally qualified judges exercising strong discretionary (and often final) powers in local administration alongside and over elected local authorities. Even primitive interpretations of the doctrine of separation of powers received little attention. In her otherwise excellent discussion of the dispute, Whetstone does not appear to appreciate the peculiar nature of the sheriff's position, perhaps because her perspective is that of the historian rather than the lawyer.<sup>27</sup> In addition, she does not give any attention to the comments made with respect to the powers in local administration.

The office of sheriff substitute received little mention in the Heritable Jurisdictions (Scotland) Act 1747.<sup>28</sup> It was, however, to evolve remarkably in the period between the passing of the Act and the late nineteenth century. In 1748 the substitutes were poorly paid, part time officials of low status - yet by 1880 they were respected (although modestly remunerated) local judges and governmental officers, and usually members of the Faculty of Advocates.<sup>29</sup> However, memories of their previous status were to linger, in large measure due to the efforts of the deutes, resulting in a stigmatisation which lasted until the 1970s.<sup>30</sup>



The "Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland"<sup>31</sup>, published in 1868, provides ample evidence of the undignified professional fracas between deutes and substitutes, and of the importance of the powers in local administration for the protagonists. The deutes argued that the substitutes were not of sufficient ability, authority, or dignity to deal with the more important governmental duties<sup>32</sup>: in addition, they laid great stress on the fact that, as practitioners at Parliament House in Edinburgh, they were not susceptible to "local influences".<sup>33</sup> It was also argued that as substitutes exercised a limited jurisdiction over sheriff court districts (as opposed to entire sheriffdoms), they were not able to assess the full range of the deutes' duties.<sup>34</sup> Taken together, they felt that these factors justified their position. However, the substitutes were not greatly impressed by these arguments<sup>35</sup>, and sought the abolition of the office of deute. In the context of a discussion of the Sheriffdom of Lanarkshire, it was mooted that: "... [if] it was thought a good system ... not to have two ranks of sheriffs - a subordinate and a higher one - but to put them all into one rank .... they would all be on a par, with this difference, that one would be the senior sheriff, and I presume that he would take the administrative [ie governmental] duty of maintaining the peace and attending the boards and meetings which the sheriff [deute] must attend."<sup>36</sup>

Interestingly, the question of who actually performed most of the governmental work is never answered clearly by the evidence to the report, which is probably an indication that, as in so many other areas, practice varied widely from one sheriffdom to the next. Similarly, there was no doubt as to the suitability of sheriffs involving themselves directly in the business of local administration. However, it is impossible



to avoid the suspicion that the dispute over professional status was colouring the views of both groups as regards the amount of work which was carried out by them and their suitability for appointment. The substitutes turned the "local ties" argument of the deutes on its head, by contending that the locally based sheriff substitutes were better placed to perform the governmental work of the deutes, and that, in fact, they did so.<sup>37</sup>

The partisan nature of the evidence is well illustrated by the following excerpts from the evidence. The deutes' argument that the loss of their governmental powers would in effect mean the abolition of the office (a point well appreciated by the substitutes) was made a number of times:

".... If you deprive the non resident sheriff [ie depute] of his ministerial [ie governmental] duties and responsibilities .... you must relieve him of the responsibility of his office to a great extent ..... it would change the office more than I would like to see."<sup>38</sup>

The substitutes contradicted this view: "... it seems to me that the office of sheriff [depute] is unnecessary. The sheriff [depute] may conduct inquiries for the Secretary of State as to the propriety of proposed provisional orders, and hear applications for the closure of burial grounds ..... but in all such [governmental].... matters the sheriff substitute is entitled to act, and I presume to say is just as well qualified to act as the sheriff principal [ie depute]."<sup>39</sup>

A view commonly expressed by substitutes was that; " ... almost all the ministerial [governmental] duties are performed by the sheriff substitute. In fact, with the exception of a few of what you may call the formal duties, he does it all."<sup>40</sup>

For reasons that are not immediately apparent, the Commission does not appear to have been greatly impressed by the substitutes' submissions.<sup>41</sup> Parliament did not see fit to change the system<sup>42</sup> and appeared content to continue to allocate a wide range of powers to the sheriff. The dispute over professional duties and status, which was the only context in which the jurisdiction in local administration was raised, had been left unresolved, and was to continue: the discussion is resumed in subsequent chapters.

## **Section Two: Judicial Decisions and the Sheriff's Jurisdiction in Local Administration**

During the eighteenth and nineteenth centuries, the court developed an "internal" separation of the sheriff's powers in local administration, choosing to interpret some as "ministerial"<sup>43</sup>, and others as "judicial", "privative and final" powers.<sup>44</sup> There were also some functions which were viewed as being "judicial" but subject to appeal to the Court of Session.<sup>45</sup> The promotion of this rather primitive separation of powers had important consequences. If a power was ministerial, sheriffs were deemed to be acting outwith the judicial process, and were able to take decisions with the same degree of discretion as any non-judicial official acting under statute.<sup>46</sup> Despite there being no explicit reference to a "ministerial" jurisdiction in statutes, or any clear definition of what the term meant, it seems beyond doubt that it was used to describe those powers which were derived from the traditional governmental duties of pre-reform sheriffs.<sup>47</sup> If a power was judicial, but privative and final, sheriffs were able to utilise the powers inherent in judicial office

(eg the ability to award expenses)<sup>48</sup>: it may also be surmised from even early case reports that there was support for the view that sheriffs should narrow their discretion to questions of law and jurisdiction rather than merits if they were hearing an appeal from an elected local authority, such as a parochial board.<sup>49</sup> Finally, if a power was held to be "judicial", it could be appealed to the Court of Session as ordinary civil business.<sup>50</sup> The majority of judicial powers (both final and privative and otherwise) were allocated under the police and local government legislation of the nineteenth century, which is discussed in section three below.

Distinguishing between these general categories was not easy, and depended on how the court chose to interpret the relevant statute. Whether or not an adjudicatory, adversarial style of decision taking was adopted was not felt by the court to be relevant: it was the essential nature of the power which determined allocation. For example, in Love v. Lang<sup>51</sup>, the First Division of the Court of Session was required to decide whether a decision taken by Justices of the Peace "shutting up" a public road was ministerial or judicial. Although the case concerned justices, the court had utilised the same test in cases involving sheriffs<sup>52</sup>. If the power fell into the former category, then the legal protection inherent in judicial proceedings was not available. The court held that the justices had acted ministerially. Lord President Inglis differentiated the style of proceedings from the nature of the decision:

"... there is another question which must be ... decided, whether the proceedings before the justices were proper judicial proceedings - I mean not in form, because, as far as one can judge from the extracts, everything was done in the most

regular judicial form, but whether, acting under the statute, the justices were acting in a judicial or ministerial capacity."<sup>53</sup>

The answer to this was to be found by interpretation of the provision in question, which caused considerable problems for the court. Lord Deas noted with almost palpable exasperation that there "... is room for great doubt whether the justices acted judicially or ministerially. .... The whole difficulty arises from the vagueness and inaccuracy, if not inconsistency, of the language used in the statute."<sup>54</sup>

However, it was clear that the historical "pedigree" of the statutory powers, together with the general nature of the duties provided for, were factors in deciding whether or not a decision was ministerial or judicial:

"The clause allows thirty days public notice in order that any one interested may state objections to the road being shut up, and after hearing parties and taking such steps by visiting grounds or otherwise, as they consider necessary, the order desired by the road trustees is either granted or refused. In all this the justices act ministerially in the exercise of that power of superintending the roads of the county which they have possessed from a very early period."<sup>55</sup>

In Commissioners of Police for the Burgh of Leith v. Campbell<sup>56</sup>, the Second Division of the Court of Session was called upon to consider the nature of the sheriffs' power to designate a road as private or public following appeal from a decision of the Commissioners of Police under the Police and General Improvements (Scotland) Act 1862. This time, Lord Justice Clerk Inglis (as he was then) did not consider the question of whether the power was ministerial or judicial, but sought instead to determine whether it was a final and privative judicial power, or one which

was subject to appeal in the Court of Session. Once again, historical considerations were felt to be relevant:

"... Now the subject of this action is entirely a matter of burgh police, with which this court has never had anything to do, and this statute has, I think, for its object to introduce a procedure very summary and final. I think that the fair construction of the statute is that the question ... shall be decided by the sheriff, and that there is no other form in which the proceedings of the Commissioners can be reviewed: in short, the sheriff's jurisdiction is privative."<sup>57</sup>

Although many statutes appeared to give sheriffs a very wide discretionary power to review the decisions of public authorities, the Court of Session was anxious to limit their jurisdiction from an early stage. In a series of actions arising from a case concerning the extent of the sheriffs' powers to override the decision of a parochial board under the Burial Grounds (Scotland) Act 1856<sup>58</sup>, Lord Deas sought to restrict their discretion in cases where there was a final and privative statutory jurisdiction:

".... The more exclusive the jurisdiction conferred by the Act, the more careful, of course, the sheriff or sheriff substitute will be to keep within it, and the more cautious the result to be arrived at."<sup>59</sup>

In a later action concerning the same burial ground he argued strongly that the existence of a privative and exclusive jurisdiction to review the decisions of local authorities should not be interpreted as giving sheriffs a strong discretion to overturn decisions, even if, ex facie the statute, it seemed that one existed:

"... as to the mere suitability of one piece of ground as compared with

another, it humbly appears to me that this is a matter which the statute has committed, not to the discretion of the sheriff, but to the parochial board, who are the purchasers and proprietors of the ground for behoof of their constituents, by whom the price and all relevant expenditure are to be paid."<sup>60</sup>

It would seem that where the sheriffs were reviewing the decisions of elected authorities such as parochial boards or police commissions, and the statute gave them what were apparently wide and final powers of disposal, Lord Deas (who was in the dissenting minority) set what may be described as an "intuitive" limit on any potential discretion. It is of course recognised that ideas of local democracy were very much less developed at the time of these cases (especially in landward rather than burghal areas<sup>61</sup>), but, even at this early stage, it would have been surprising had the court not shown at least some trepidation over the fact that many of the powers involved sheriffs directly in the decision taking of elected authorities.

This may have been an influence on Lord Deas, and, without being unduly presumptuous, it is possible to view his narrowing of the sheriff's discretionary powers in the context of the general principles and rule of law theory developed in part one of the thesis. Whilst it is not suggested that Lord Deas would necessarily have viewed matters in this light, it is nonetheless possible to argue that Parliament had, on the face of the statute, allocated strong discretionary powers to the sheriff in an area which could potentially have required an unjustifiable "direct political involvement" and created an unacceptable polycentric effect<sup>62</sup>. Does this raise the issue of whether the possibility of sheriffs overturning the decisions of elected parish authorities was contrary to both ostensive judicial impartiality and competence? If it

does, it can then be argued that shrieval decisions would therefore have been potentially contrary to the ethos of the secondary morality of law, making a restriction of discretion necessary.<sup>63</sup>

In terms of the theory adopted in part one of the thesis, Lord Deas' minority judgement can be interpreted as a "retreat"<sup>64</sup> towards the standards of secondary morality, which may be characterised as being in accordance with the general principles for the exercise of statutory powers set out in chapter two. However, full recognition is given to the fact that the case is a comparatively early report, and it is appreciated that the significance of this evaluation should be limited.

### **Section Three: The Sheriff's Duties in Local Administration**

A consideration of the range and subject matter of the sheriff's powers in local administration makes it easy to understand why they featured in the disagreements between deutes and substitutes over professional status: the duties were many and onerous, and were an important element in the unprecedented expansion of local administration in the nineteenth century. Some were also prestigious, and accorded to the deutes in particular a position of influence and distinction in county society<sup>65</sup> - something which, it may be felt without undue cynicism, would have been greatly valued by ambitious senior counsel. For reasons of space, discussion is limited to the main areas of the sheriffs' influence in local government and does not comprise an exhaustive list of their powers. Some duties have been excluded specifically from the ambit of the thesis, such as those concerned with commercial matters and the administration of justice.



Despite the relative paucity of sources, especially for the eighteenth century, it is possible to ascertain a reasonable picture of the multifarious nature of the sheriffs' powers in local administration.<sup>66</sup> As indicated in section one, the range of powers had developed from the medieval origin of the office: accordingly, post-reform sheriffs continued to be involved in most of the main areas of local administration. During the period under consideration, they were also allocated new powers which frequently made them pivotal in the implementation and supervision of the immense statutory reform of Scottish local government which commenced in the early nineteenth century.<sup>67</sup> Their role as the link between central government and the sheriffdom in matters of local importance was thereby bolstered, and their powers to take decisions in local administration as both governmental and judicial officers were increased greatly. There was no consistency in the legislation, and first instance and appellate powers were allocated in an ad hoc, pragmatic fashion.

The subject matter of the sheriff's jurisdiction encompasses powers held in connection with: (i) the preservation of public order; (ii) "striking the sheriff fiars"; (iii) electoral law; (iv) fiscal responsibilities; (v) the Commissions of Supply; (vi) "police government"; (vii) roads and bridges; (viii) poor law administration; (ix) mental health; (x) prisons; (xi) registration; and (xii) shipping.

(i) As in the pre-reform period, the sheriffs (principally the deputies) had an important jurisdiction as the Crown official responsible for the maintenance of order and the suppression of insurrection in their sheriffdoms.<sup>68</sup> This power was derived directly from the military jurisdiction held by medieval sheriffs, and was to continue until comparatively recently. It should be noted that the sheriffs' duties were not



simply those of magistrates authorising the use of force by the military: they led and could personally direct operations, by virtue of the fact that they were the most senior Crown officials within their sheriffdoms.<sup>69</sup> There are numerous examples of sheriffs exercising these powers throughout the eighteenth and nineteenth centuries.<sup>70</sup>

(ii) "Striking the fiars" was an important and well documented governmental function "incumbent on all sheriffs and stewarts".<sup>71</sup> It too had been a duty which had previously been performed by the pre-reform sheriffs. The sheriff fiars was the means by which the price of "all sorts of grain shall be holden as estimated at in their counties, where a party liable in a quantity of grain or victual fails in delivering or tendering it in due time"<sup>72</sup>, and was a not insignificant function. "Striking the fiars" was, perhaps surprisingly, to remain part of the sheriffs' jurisdiction until the 1960s, although by that time it had ceased to be of any real significance.

Bankton gave a detailed description of the procedure for striking the fiars, which was provided for by Act of Sederunt in 1723.<sup>73</sup> The procedure, as one would expect of an Act of the Court of Session, had an adjudicatory, adversarial style, even although the purpose of the process was of a governmental nature. The procedure remained largely unchanged, and was renewed by an Act of Sederunt of 14th November 1816. However, as Knox and Company v. Law and Others illustrates, it would seem that the Act of Sederunt was not universally followed, and that a more inquisitorial style was adopted in some sheriffdoms.<sup>74</sup>

It is clear that the Court of Session did not consider the striking of the fiars to be a justiciable matter, and appeals from the fiars were held to be incompetent: the sheriffs were felt to be acting in a governmental, as opposed to judicial, role. In

1806, the court held in Home v. Swinton that: "... the sheriff in that part of his duty acts ministerially .... he does not act under the authority of the Court of Session."<sup>75</sup> This point was echoed in Love v. Lang, which was discussed in section two.<sup>76</sup> Very little would seem to have changed by the time McGlashan noted in the 1868 edition of "Sheriff Court Practice" that the proceedings were "in some respects judicial as well as ministerial".<sup>77</sup>

(iii) The sheriffs also performed an important governmental role in electoral law: this jurisdiction was to last until the Local Government (Scotland) Act 1973. Their powers were again derived from those of the pre-reform sheriffs. Bankton gave a very full discussion of the subject, which was a controversial and litigious area throughout the eighteenth and nineteenth centuries<sup>78</sup>, and noted that it was "... a momentous part of the sheriff's [ie the depute's] ministerial office to serve writs directed to him, in ... the election of members of parliament for counties and borows [sic] .... And this, not being a matter judicial is within the province of the Sheriff Principal [ie High Sheriff] in the first place; but in default of him, the Sheriff Depute is bound to do it; or the Sheriff Principal may waive it; and leave the charge to the same to the Depute, as he thinks proper."<sup>79</sup>

Obviously, since no "sheriffs principal" (ie high sheriffs) were appointed, the duty was de facto performed by the sheriffs depute. The deputies' role in electoral law was a crucial one. They were responsible for the execution of the writs of election, and were in charge of electoral registers and the conduct of general elections.<sup>80</sup>

Political bias was, however, always a matter of considerable concern, as throughout the eighteenth and much of the nineteenth centuries,<sup>81</sup> Scotland was

controlled by political patronage as if it was "one vast rotten burgh".<sup>82</sup> Corruption, bribery and coercion were commonplace. Accordingly, provision was made to ensure that sheriffs did not allow any "local ties" or political loyalties to interfere with their conduct.<sup>83</sup>

The electoral reforms brought about by the Representation of the People (Scotland) Act 1832<sup>84</sup> were to increase the governmental and judicial duties of the deutes and their substitutes considerably: indeed, the deutes were to perform a central role. They were to decide on the merits of claims for representation, dealing firstly with those claims to which there had been no objection, and were also responsible for the annual revision of the electoral register. This latter function was clearly an administrative undertaking of some magnitude, and it may be inferred that much of the work was carried out by the substitutes and the sheriff's clerks, assisted by parish schoolteachers in the counties, and the town clerks in the burghs. Where there was a grievance, an appeal could be heard by a specially constituted body known as the Judges of Appeal, which was made up of three deutes. Appeals on registration could be taken further at the circuit Courts of Justiciary, and were clearly seen as justiciable issues.

Other governmental duties included the division of counties within the sheriffdom into Polling Districts, and the establishment of Polling Places for contested elections.<sup>85</sup> The deute or a substitute was to be present at all Polling Places to ensure that the law was observed. Finally, the Writ for the Election of Members was served to the deute in person, and proclaimed by him at the Mercat Cross or other suitable public place. He was also required to; "... openly declare the State and

Result of the Poll and make the Proclamation of the Member or Members chosen."<sup>86</sup>

Writing in 1842, McGlashan noted that the sheriff had a number of governmental and judicial duties in connection with the hearing of appeals from Parliamentary and burgh electoral registers.<sup>87</sup> In the period up to 1870, there was a considerable amount of legislation dealing with elections and their conduct. The sheriffs' duties remained essentially the same as under the Act of 1833, but it may be presumed that the burden of work was increased significantly as the number of electors was increased.<sup>88</sup>

(iv) The post-reform deutes also continued to carry out the largely governmental duties of local fiscal officer of the Crown which had been held by the pre-1747 Sheriffs Principal. Bankton noted that the "Sheriff Deutes, by themselves or substitutes are bound to serve all writs or processes issuing out of the Exchequer."<sup>89</sup> Erskine recorded that their duties in this field involved the levying of "the escheats of those ... denounced rebels, and the blanch and feu rents, casualties of superiority, and other duties payable to the Crown, for which they must account in Exchequer".<sup>90</sup> The sheriffs were also, as governmental officials, charged with the more general duty of "looking after every matter with regard to the Crown's interest in the county."<sup>91</sup>

However, the 1850s saw a change in the sheriffs' fiscal duties. Under the Infefment Act 1845, it was no longer necessary for the sheriff to give infefment on Crown precepts<sup>92</sup>; under the Act of Sederunt of 3rd July 1846, the fees were levied in Chancery. The Service of Heirs (Scotland) Act 1847<sup>93</sup> did allow infefment on the sheriffs' precept, subject to the confirmation of the Exchequer: however, the

Sheriff Court (Scotland) Act 1853<sup>94</sup> abolished these official fees.<sup>95</sup>

(v) Notwithstanding this, it should not be thought that the sheriffs' fiscal duties had been brought to an end. The sheriffs had extensive governmental duties involving them with the local Commissions of Supply. It is this connection perhaps more than any other which illustrates the influential position that sheriffs held in Scottish local administration. The Commissions of Supply were the most important institutions in county government prior to the establishment of the county councils in the late nineteenth century.<sup>96</sup>

During the eighteenth century, the main duty of the Commissions was the assessment and collection of the land tax.<sup>97</sup> They were also charged with responsibility for the collection (although latterly not the assessment) of the assessed taxes, county roads, bridges, tolls and ferries. In the nineteenth century, the Commissions were also required to carry out an increasing number of other functions in policing and county government.<sup>98</sup>

The sheriffs depute and their substitutes were allocated important duties in connection with the operation of the Commissions: indeed, they often seem to have been the pivot around which the Commissions revolved. For example, the sheriffs, acting as the local representatives of the crown, were responsible for the calling of the most important Commission meetings on the dates set by statute. Until 1865, sheriffs were required to call the annual land tax meetings, and it is clear that without their involvement little would have been achieved.<sup>99</sup> The sheriffs were also given more general duties, particularly during times of national emergency. For example, the Napoleonic wars led to the introduction of new taxes, and sheriffs were made

responsible for their implementation and supervision in Scotland.<sup>100</sup>

However, throughout the eighteenth century the method of assessment for taxes was inefficient and haphazard, as the Commissions were amateur, voluntary bodies, composed of the local gentry. Eventually, central government took direct control of assessment for taxes, leaving only collection in the hands of the Commissions. Direction of the local Commissions of Supply fell to the Commissioners of Assessed Taxes, who were selected from the wealthiest, and therefore most influential, Commissioners of Supply.<sup>101</sup> Under the House Tax Act 1803, sheriffs depute and substitutes were appointed to serve as Commissioners of Assessed Taxes.<sup>102</sup> The sheriffs were given a number of other important governmental functions to perform in connection with the Commissions. They acted as deputy conveners of the committees set up to divide the counties into Commission districts. They were also, by virtue of their office, members of the local Commissions. For example, the Taxes (Scotland) Act 1812 provided that not less than three Commissioners were to be appointed for each district "exclusive of the sheriff depute or substitute in such district", and it was also stipulated that "no more than one sheriff substitute shall act at any meeting".<sup>103</sup>

(vi) The authority of the sheriffs' position, their traditional governmental role of local representative of the Crown, and their connections with the Commissions of Supply, encouraged the legislature to involve them in the development of what are now major local government functions. Throughout the nineteenth century, sheriffs were given important duties in the development and administration of "police systems". This term covers not only the provision of police forces, but also essential

local services which are now carried out by regional or district councils: for example, clean water, cleansing, lighting, licensing, public health, paving and planning.<sup>104</sup>

The massive nineteenth century reform of municipal government was initiated by the Burghs and Police (Scotland) Act 1833.<sup>105</sup> Sheriffs had an important role in establishing "police systems" under the Act, and in supervising their administration once they were in operation. For example, it was provided that the sheriff depute was required to decide, after a local election had taken place, whether the provisions of the Act should apply to a burgh, and therefore whether local Commissioners (ie councillors) should be elected to administer the system. If the depute found from the poll that the terms of the Act were satisfied, he was required to record the minutes of his decision in the sheriff court book of the county.<sup>106</sup>

The Act reflected an increased awareness of the importance of proper sanitation, licensing and town planning for the prevention of disease and the protection of public safety. The responsibilities of the Police Commissions were extensive. They covered, among other duties, the apprehension of vagrants, the regulation of pavements and streets, the demolition of ruinous houses, the supervision of adequate sewers and drains, and the provision of safe water, gas supplies, and hygienic slaughter houses. The Commissioners were also empowered to erect weigh-houses, build waterworks, recruit and supervise fire brigades and regulate hackney carriages.<sup>107</sup> Sheriffs were given a multitude of governmental and judicial duties in the new "police systems". For example, they were empowered to swear in police officers and night watchmen, order the removal of stairs and encroachments on streets, secure or remove ruinous houses, and decide disputes on



the rates payable on slaughterhouses.<sup>108</sup> The "sheriff of bounds" was also to take the final decision on complaints arising from assessment for local taxes. The sheriffs' jurisdiction as local judge was bolstered by the provision that "all offenses specified in the Act may be tried by the sheriff of the county."<sup>109</sup>

The Police (Scotland) Act 1850, "... for regulating the policing of towns and other populous places ... and for draining, lighting and improving the same"<sup>110</sup>, continued this trend. The Act provided that the sheriff depute (or a substitute) was to superintend a poll held by householders, and decide whether the Act should be enforced in the relevant burgh or "populous place". If the sheriff decided that the establishment of a "police system" was appropriate, then he could authorise the election of Commissioners of Police.<sup>111</sup> They were also allocated governmental and judicial duties once the Act had become effective in a locality, and a Commission of Police had been established. Sheriffs were required to settle disputes regarding the Commissions' account books, decide the amount to be paid from the "common good", hear appeals on private or district assessment for drainage rates, protect the tenure of the Superintendent of Constabulary from political interference, and regulate burial grounds and slaughterhouses on the grounds of public health. Further powers relating to the protection of public health involved the sheriffs in dealing with purveyors of "unwholesome and adulterated food", and establishing drainage districts for the construction and maintenance of drains and sewers. There were a number of other appeals of this nature concerning drainage from private houses: "persons aggrieved" could apply to the sheriff over decisions taken by the Commissioners concerning the levels of house foundations, house drains and the building or rebuilding of any



house.<sup>112</sup>

The Act also involved sheriffs in burgh planning. It was provided that it was not lawful to "... make, or lay out any new street unless and until the proposed width thereof, with reference to the hight of the houses and other circumstances be approved by the sheriff."<sup>113</sup> Those aggrieved by the laying out of new streets, or the alteration of an existing plan, could appeal to the sheriff, who were empowered to order the owner of a "building, wall or other thing" to "take down, repair, rebuild, or otherwise secure" the structure to the satisfaction of the Surveyor of the Commission if he felt it to be a public danger.<sup>114</sup> It was stipulated that "with respect to the improvement of burghs and to objections to the works to be constructed by or subject to the approval of the Commissions", an appeal to the sheriff was final and not subject to review by the Court of Session.<sup>115</sup>

However, the most important and clearly governmental duty under the Act was the appointment of the sheriff depute as the crown official authorised to confirm or refuse bye-laws drafted by the Commissioners. This function illustrates the significance attached to the sheriff's role as the local representative of the Crown:

"No bye-law made by the Commissioners ... shall come into operation until the same be confirmed by the sheriff; and it shall be incumbent on the sheriff, on the request of the Commissioners, to enquire into any bye-law tendered to him for that purpose, and to allow or disallow of the same as he may think meet."<sup>116</sup>

To conclude this sub-section, the sheriffs' duties under the burgh police Acts led to a tradition of shrieval involvement in legislation concerned with public health: indeed, the Public Health (Scotland) Act 1867<sup>117</sup>, which was a landmark in public

health provision in Scotland, was drafted by Sheriff Depute Munro.<sup>118</sup> Sheriffs were given a number of governmental and judicial powers to secure a more effective public health administration under the 1867 Act, and many of them were continued under the Public Health (Scotland) Act 1897.<sup>119</sup>

(vii) The sheriffs' connections with the Commissions and justices of the peace also involved them in the administration of roads and bridges in the sheriffdom. In the early eighteenth century, the responsibility for the construction and maintenance of roads lay with the Commissions of Supply and the Justices of the Peace.<sup>120</sup> Their efforts, however well intentioned, were haphazard and inadequate.<sup>121</sup> Interestingly, due to the necessity of judicial circuits, the Highways (S) Act 1718<sup>122</sup> made the Lords of Justiciary responsible for the supervision of the Commissions of Supply, which were required to draw up an annual report on the condition of roads, bridges and ferries for their Lordships.

Perhaps surprisingly, the role of sheriffs in the expansion and supervision of road networks for trade and military purposes has received little attention. The deputes and substitutes were particularly well placed to become involved: as the local Crown administrators they were closely connected with the Commissions of Supply and local Justices. In addition, their position in the judicial hierarchy meant that they were subordinate to the Lords of Justiciary, acting in, what is to a modern reader, their rather unusual role as road authority.<sup>123</sup>

Parliament showed little interest in improving roads, or in providing more effective means of funding. Accordingly, the statute books of the period abound with Local and Personal Acts, which authorised new systems of local taxation to provide

funding for road development.<sup>124</sup> It was normally provided that both deutes and substitutes could act as Roads Trustees, who were responsible for administering the roads under the terms of the relevant Act.<sup>125</sup> Effectively, the Roads Trustees were a sub-committee of the Commissions of Supply, but they maintained a separate administration. The Highways (S) Act 1845<sup>126</sup> brought to an end the need for a private bill to make changes in road funding. A national system for the funding, planning and administration of roads, bridges and ferries was introduced by the Roads and Bridges (Scotland) Act 1878, which maintained the sheriffs' position. Section 113 of the Act provided that sheriffs could serve as Roads Trustees, and there were also a number of governmental and judicial duties.<sup>127</sup>

(viii) Sheriffs also held significant powers under the poor law. Prior to 1845, the administration of the poor laws and parochial relief varied greatly from parish to parish.<sup>128</sup> However, the Poor Law (Scotland) Act 1845<sup>129</sup> created Parochial Boards, which were to administer relief for the poor in compliance with public health legislation. The Act also provided for a Board of Supervision, which acted as the central administrative authority, although the local Parochial Boards had a considerable degree of autonomy.<sup>130</sup> Parliament once again sought to utilise the sheriffs as governmental officials, and the deutes played a prominent part in the work of the Board of Supervision.<sup>131</sup> The statement to the 1868 Commission of Sir John McNeill, a Chairman of the Board of Supervision, made it clear that sheriffs depute were the mainstay of the Board.<sup>132</sup>

At a more local level, sheriffs also had a number of important governmental and judicial duties. For example, they were empowered to decide disputes on the

validity of elections to the local parochial boards, and exercised the judicial power of deciding whether the board had erred in law by refusing relief to an appellant (a power which had been held by pre-reform sheriffs). Sheriffs were also authorised to make orders for the removal of English and Irish paupers from Scotland.<sup>133</sup>

(ix) Sheriffs carried out important functions in connection with mental health. Under the Madhouses (Scotland) Act 1815<sup>134</sup>, sheriffs were required to supervise the regulation of "Madhouses", and the "reception and due care and confinement of furious and fatuous persons and lunatics." The importance of the sheriffs' powers cannot be over-estimated: they were responsible for the granting of yearly licences to those who wished to run private asylums (for the unfortunate gentry and middle classes), the appointment of Medical Inspectors, the security of asylums, a bi-annual inspection of asylums, and the rules and regulations necessary for the proper management of premises.<sup>135</sup>

Sheriffs were also empowered to make the necessary orders for the "reception of lunatics". The Act provided that "... no person or persons shall be received into any house for the reception and the care and confinement of furious and fatuous persons or lunatics, ..., without an order being made by the sheriff or steward depute or substitute."<sup>136</sup> The order had to be signed by a "medical person" who was appointed by the sheriff. Interim orders could be made for "reception" for a period not exceeding fourteen days<sup>137</sup>, and the sheriff was empowered to free any person who he considered had been "improperly" detained.<sup>138</sup>

These duties remained largely unaltered until the Lunacy (Scotland) Act 1857<sup>139</sup>, which established a Board to administer both public and private asylums:

the Board was to be replaced after a period of five years by two Inspectors. In the event, it was continued. The powers of the sheriffs were modified, although they still continued to serve as governmental officials for the purposes of the licensing and inspection of asylums. Most importantly, their powers with regard to admission of patients, appeals, transfers and liberation remained, and indeed were made more comprehensive.<sup>140</sup>

There was an inferior "twin" system in operation for the care and confinement of "pauper lunatics". Under the Lunatics (Scotland) Act 1858<sup>141</sup> sheriffs were empowered to order the "reception and confinement" of "pauper lunatics" in special wards of poorhouses, until proper district asylums could be established. The Lunacy (Scotland) Act 1862<sup>142</sup> created Boards to deal with much of the administration of the asylums, but the main power of "reception and confinement" remained with sheriffs, who were still able to order the detention of "lunatics and dangerous lunatics".<sup>143</sup>

(x) Sheriffs had traditionally supervised the provision of prisons in their counties, as part of their governmental duty to provide for the peace and security of their sheriffdoms. The Heritable Jurisdictions Act 1747 provided that;

"... all and every sheriffs of shires [ie high sheriffs], ..., or their deputies, within Scotland, shall, and they hereby require to visit and inspect all houses, places or rooms, as shall be so entered as Prisons, and to disallow and prohibit the use of the same, in case that they appear to the said sheriffs or stewarts, or their deputies respectively, to be places grievous or unhealthy, or not agreeable to the regulations."<sup>144</sup>

It was not until the Prisons (Scotland) Act 1839<sup>145</sup> that major changes were effected in prison administration, but the position of the sheriffs remained prominent. A General Board of Directors of Prisons was established, with a heavy shrieval bias.<sup>146</sup> Prison Boards were established for each county to carry out the directions of the General Board, and to administer local prisons. The deputies and substitutes were the only stipulated members: "... Provided always that the sheriff depute of each county for the time being, or in his absence the sheriff substitute, acting at the head or returning burgh, shall, by virtue of their offices, be members of such county boards."<sup>147</sup> The other members were drawn from the local Commission of Supply, of which the sheriff was also an ex officio member.<sup>148</sup>

The Prisons (Scotland) Act 1860<sup>149</sup> continued the appointment of sheriffs to the local prison boards, and also provided that the sheriffs were responsible for the implementation of the terms of the Act, the setting of the first board meetings, and the interim chairmanship of the boards. They were also to settle any disputes arising from the assessment of local tax payable for the county prison service.<sup>150</sup> Subsequent legislation created a number of other governmental duties for sheriffs, which involved making regular inspections of prisons, and inquiries in respect of naturally deceased, executed or insane prisoners. Prison Governors were also required to submit a monthly report on civil prisoners for the sheriff to consider.<sup>151</sup>

(xi) Another important governmental role allocated to sheriffs was the annual inspection of county records: under the Public Records (Scotland) Act 1809<sup>152</sup>, the sheriff was required to produce an annual report on the state of the records within the counties of his sheriffdom. The Registration of Births, Deaths and Marriages

(Scotland) Act 1854<sup>153</sup> provided for a new system for the registration of births, deaths and marriages in Scotland.<sup>154</sup> However, the sheriffs continued to have important powers. It was stipulated that "sheriffs of each county shall have the control and superintendence of the registrars", and they had a wide accompanying range of governmental duties to perform. The position of the sheriffs was bolstered further when they were given the authority to dismiss incompetent registrars.<sup>155</sup>

(xii) Finally, a rather unusual governmental duty performed by the "maritime" sheriffs was that of serving as Commissioners of the Northern Lighthouses under the Erection of Lighthouses Act 1786.<sup>156</sup> Serving as a Commissioner in the age of sail was far from being a sinecure: the post involved making an annual inspection of all the lighthouses around the Scottish coast in an Admiralty frigate. As Sir Walter Scott recorded in his travel diary "The Northern Lights", which described the voyage of the Commissioners in 1812, the wooden hulled sailing vessels of the period were dangerous and vulnerable, and during wartime the voyages became even more hazardous.<sup>157</sup>



#### **Section Four: Conclusion**

The period 1747 to 1870 was one of change. The office of sheriff ceased to be an hereditary, feudal title, and became a post held by lawyers, who were members of the Faculty of Advocates. However, the medieval range of powers held by the reformed sheriffs - known as sheriffs depute - remained the same, notwithstanding the fact that control of the office had passed to the legal profession. This meant that in addition to exercising a criminal and civil jurisdiction, the deputies also held the "ministerial", or governmental, power of the hereditary sheriffs, and the important and prestigious position in county society that went with it. As the majority of deputies were counsel at the Court of Session bar, many of their duties, both judicial and governmental, were performed by locally based sheriff substitutes. In time, the range and complexity of the work performed by the substitutes necessitated an improvement in their status: in 1747 substitutes were junior assistants to the sheriffs, yet by 1870 they had become legally qualified, independent judges.

The absence of any reliable or professional local administration in Scotland meant that sheriffs depute and their substitutes continued to be utilised by Parliament as the local agent of the government throughout the eighteenth and nineteenth centuries. They were in an ideal position to be used as such: sheriffs had their own local headquarters, staff and authority. They were also comparatively reliable and educated. In contrast, the Commissions of Supply and burgh councils were amateur, inefficient and not infrequently corrupt. It is therefore not surprising that Parliament entrusted the sheriffs with a pivotal role in areas such as the preservation of order, electoral law, taxation, poor law, mental health, prisons and registration.



There were massive changes in urban administration in the mid nineteenth century: government moved from the liberal "laissez faire" model to a proactive, more interventionist system. Unlike the changes of the twentieth century, this increase in government was largely based on the development of local, voluntary administration, rather than central government.<sup>158</sup> Communities were able to adopt local "police" systems by "enabling" legislation, and develop their infrastructure after a vote - although it should be noted that the franchise was extremely restrictive by modern standards.<sup>159</sup>

Sheriffs were given a large number of important statutory powers to implement and regulate these developments for the reasons noted above. The suitability of sheriffs exercising wide powers in local administration whilst sitting on the judicial bench was not questioned by commentators. The separation of powers was given little attention, least of all by sheriffs, who only raised the matter of the suitability of their powers in local administration in the context of the dispute between deputed and substitutes over status.

Nonetheless, a primitive "internal" separation was effected by the courts. Certain provisions were identified as being part of a set of powers concerned with local administration, which was discrete from criminal or civil business. Within this grouping, powers could be seen as being "ministerial", "final and privative", or subject to appeal to the Court of Session. The use of the adjudicatory process as the means of decision taking by sheriffs does not appear to have been a factor in deciding whether a power belonged to one category or the other. In addition, it should always be remembered that the courts used terminology without any real consistency, and

judges and commentators were very often rather vague in their interpretation of the different styles of provision.

## **Chapter Six: The Sheriff's Jurisdiction 1870-1930**

### **Introduction**

This chapter covers an important period of change and development in Scottish local administration and is set out as follows. Section one follows the continuing dispute between sheriffs over the question of professional status, and attempts to put it and discussion of the statutory jurisdiction generally within the wider context of the reform of Scottish local administration. Section two gives detailed consideration to case law developments, using the rule of law theory and general principles adopted in part one as an aid to evaluation. Section three gives an idea of the substantive content of the jurisdiction by setting out a short commentary on the sheriff's most important functions during the period under consideration. The main points and developments are then summarised in a brief concluding section.

### **Section One: Developments in the Sheriffs' Powers from the 1880s to 1930**

The period between circa 1870 and 1930 was one of remarkable development in Scottish government and local administration. The Scottish Office was established in 1885<sup>1</sup> in response to nationalist campaigning, and began to assume the responsibility of supervising and controlling the different Boards which directed much of Scotland's social policy.<sup>2</sup> Its power increased steadily as the role of central government was developed, and functions were devolved to it.<sup>3</sup> County councils were established in 1889<sup>4</sup>, bringing much of the power and influence of the Commissions of Supply to an end. Burgh and town councils were also reformed.<sup>5</sup> The fifty years between 1880 and 1930 saw the establishment of the main features of

the system of local administration which was to prevail in Scotland until the Local Government (Scotland) Act 1973.<sup>6</sup> The sheriffs' jurisdiction in local administration must be evaluated in the context of these changes.

Central to the development of government was the extension of the franchise and the corresponding reform of electoral law at both Parliamentary and local government level<sup>7</sup>: politicians at both levels became answerable to a wider electorate, and sought support at the ballot box by developing administrative powers to secure popular social goals. The growth in the franchise was itself a response to fear of the social and political unrest which could have manifested itself if political representation had remained the privilege of the male property owning classes.<sup>8</sup>

As well as having implications for the size and power of administrative authorities, the widening of the franchise also had an effect on constitutional theory. It led some to voice concern over the danger for Parliament, the rule of law and traditional Whig liberalism caused by the development of administrative power: a sympathetic evaluation of Dicey and Hewart places them in this context.<sup>9</sup>

For British constitutional lawyers, the last century has been dominated by Dicey's argument that the British constitution is founded on the rule of law and the supremacy of Parliament: a brief outline of his rule of law theory was set out in chapter one. His work was particularly influential in the period under consideration in this chapter.<sup>10</sup> Dicey sparked fierce controversy and debate over the nature and direction of the constitution and the role of the courts as a control of administrative action - themes which, although Dicey's theory was concerned with England, are of clear relevance to the sheriff's jurisdiction in local administration.

As was mentioned in chapter one, it is not difficult to identify the flaws in Dicey's arguments. However, despite his failings, it is argued that modern rule of law theorists should give Dicey the recognition due to him. Although his devotion to the "balanced constitution"<sup>11</sup> was in many respects emotional rather than rational, he provided Britain's notoriously pragmatic judiciary with some theoretical idea, however flawed, of why they should take care to avoid direct involvement in political areas, and a warning for Parliamentarians who might have been tempted to make more frequent use of the court as a proactive instrument of social policy. In the context of the general principles set out in chapter two, it may therefore be argued that Diceyan arguments encouraged the judiciary and legislature to uphold ostensive judicial impartiality and competence, thereby promoting the positivist ethos of secondary morality and the rule of law itself.

Given the developments of the period, one might have expected commentators to inquire whether the sheriff's governmental jurisdiction conflicted with either the democratisation and professionalisation of local authorities<sup>12</sup>, or Diceyan concerns that for judicial officers to become too closely involved with political decisions would be "unconstitutional". In fact, there was little comment, which itself is indicative of the rather parochial nature of the debate.

As before, the discussion concerning the nature of the sheriffs' powers in local administration was largely conducted in the context of the argument between deputed and substitutes over the question of status. An article in the 1898 Juridical Review made it clear that the substitutes' main complaint was the "niggardliness" of the Treasury:

"... since 1853, when the salaries were last adjusted, there has been a large growth and a great enlargement of the judicial and administrative business committed to the sheriff substitute. In fact, the "inferior judge", ..., now requires to be a superior person, .... It is undeniable that the cost of living, as an educated gentleman occupying an important public office, is expected to live, has much increased since 1853: and yet no step has been taken to establish the minimum salary recommended by the Commission of 1870."<sup>13</sup>

Clearly, feelings ran high among the substitutes, and, in the circumstances, it is hardly surprising. In addition to the fact that they had been paid under the same terms and conditions for nearly fifty years, they received roughly half the salary of English county court judges, who had no duties as governmental officials (or a criminal jurisdiction). Moreover, the Memorial presented to the Treasury by the Association of Sheriff Substitutes in 1898 painted the dismal picture of substitutes having to pay their own travelling expenses whilst on official business. It is small wonder that the Juridical Review article on the matter finished on a plaintive note: "It may be said that the sheriff substitutes of Scotland deserve generous treatment: but they are at least entitled to justice."<sup>14</sup>

Proposals were put forward to raise the salaries of all sheriffs, although principally those of the substitutes.<sup>15</sup> Campbell suggested that substitutes should receive a salary of seven hundred pounds per annum, subject to a reconsideration of their role: he suggested a carefully controlled national sheriff substitute service, with a promotion scheme to encourage elevation to depute - in short, a career judiciary. What makes these proposals relevant for the purposes of this thesis is that the

substitutes' governmental duties were an important element in any reconsideration of functions:

".... Owing to his residential or local connection with a particular county, it would be better that the sheriff substitutes be relieved of all purely administrative duties - in so far as he has any which are not discharged by the sheriff [ie depute] at present. He should ... be the local judge or magistrate, and no more - and he should avoid all risk of collision with county officials in ordinary administrative matters."<sup>16</sup>

It is not unreasonable to suppose that the impetus behind this argument was provided by the concern that for an independent judge to be involved directly with political issues was difficult to square with Dicey's emphasis on judicial independence.<sup>17</sup> Similarly, it may have been felt that adjudication was unsuitable as a decision taking process in local administration.

The dangers of ignoring these factors was illustrated by the 1917 Report on Scottish Housing,<sup>18</sup> which was extremely critical of the sheriffs' activities. The Report revealed that sheriffs were exercising their governmental discretion to the detriment of local authority public health and slum improvement policies. It is clear from the Report that many sheriffs were taking a pedantic, legalistic approach to interpreting the powers of local authorities: in so doing, they were felt to "discourage local authorities from trying to improve housing in their district, and encourage owners [ie landlords] to resist the demands of Public Health departments."<sup>19</sup> The findings provide a clear example of the dangers inherent in the allocation of powers which require a "direct political involvement" and which have the potential for a strong polycentric effect. The sheriffs limited their discretion by

strict statutory interpretation to the extent that their ostensive impartiality and competence was questioned.

Sheriffs were found to be applying the standards of habitability set by the Public Health (Scotland) Act 1897 some twenty years after it had been passed. This effectively prevented local authorities from improving the standards of habitability until there was new legislation setting out an updated test, an approach which showed the sheriffs and the adjudicatory process in a very poor light:

"So far as the occupant is concerned, it would appear that the law, as interpreted by the courts, is that his house is reasonably fit for human habitation, without sink or water closet inside or even adjacent to the house. It goes without saying accordingly that the house must also be held to be reasonably fit without a scullery or a bath or water inside the house for drinking or washing."<sup>20</sup>

The Report went on to praise the efforts of local authorities, and only just stopped short of suggesting bad faith and bias on the part of the sheriffs:

"In cases where the local authorities have displayed energy and have endeavoured to secure a raising of the present standard [of slums], the sheriffs appear to accept a low standard of habitability because that is the standard that has hitherto prevailed, and they incline to look with disfavour on the views of local authorities and their officials as being in advance of the times."<sup>21</sup>

The Commission also noted that "... the standard ... adopted by some sheriffs, is so low that it is quite out of date, and would appear to be clearly and distinctly in contravention to the letter as well as the spirit of the law."<sup>22</sup>

Notwithstanding this strong criticism, sheriffs continued to give little attention



to their governmental powers outwith the context of the continuing disagreements between deutes and substitutes. The 1928 Commission on the Court of Session and Office of Sheriff Principal<sup>23</sup> provided another opportunity for professional rivalry: substitutes were still poorly paid<sup>24</sup>, and the deutes continued to hold the prestige and status which was traditionally due to the sheriff of the county. As had been the case before the 1914-18 war, the duties in local administration were viewed as being an important justification for the continuation of the office of deute, although the substitutes claimed to perform most of the work.

The Commission was actively considering the abolition of the office of deute. For example, the Faculty of Procurators and Solicitors in Dundee argued in oral evidence that there should be:

"... a gradual increase in the status and emoluments of the sheriff substitute, including a reasonable prospect of promotion to the Court of Session ...", together with, "... the abolition of the office of sheriff [deute]; [and] that his administrative [ie governmental] duties be transferred to sheriff substitutes within their districts

....<sup>25</sup>

It was, however, recognised by some interviewees that a number of the powers held by the sheriffs deute could be allocated to local authorities, rather than to the substitutes:

"... such administrative duties as the sheriff principal does perform can be quite well distributed among the sheriffs [ie substitutes] under the new [ie a proposed] system, or taken over by existing public officials".<sup>26</sup>

However, the deutes attempted to refute both arguments by placing great

emphasis on the importance of appointing Edinburgh based senior counsel as governmental officials in the counties. Perhaps surprisingly, they chose to give little attention to the view that it might have been more appropriate for the new local authorities to assume much of their jurisdiction.<sup>27</sup>

Sheriff Depute Crole, for example, produced a long report for the Commission, in which he stressed the importance of the deposes' role in local administration. He even went as far as to differentiate those powers in which only the depute could act from those which substitutes could also perform. This may have been counter-productive, as he was forced to admit that "... the great majority of those applications may be taken by the sheriff substitute, but the general rule is that the more important of them are disposed of by the sheriff [depute]."<sup>28</sup>

Lord Dunedin was also strongly supportive of the deposes' role as the local official of government being continued:

"From the point of view at Dover House [Scottish Office headquarters at Whitehall] he [the depute] is the one man you have to depend upon. He is local to an extent in knowing the place and he is not local in terms of being subject to local influences. He, as a rule, I am glad to think, has been a man of great common sense, and again and again when something has to be found out, or when duties have to be performed in connection with keeping the peace, he is the man upon whom you have had to depend."<sup>29</sup>

There was, however, a considerable amount of disagreement, and Lord Ashmore's comments were entirely contrary to those of Lord Dunedin: "The administrative duties of the sheriff principal were practically nil in my case."<sup>30</sup> The

evidence of the representative of the Scottish Law Agents Society was also at odds with that of Lord Dunedin:

"I understand that in some quarters great weight is placed on the administrative functions of the sheriff [depute]. I have tried to find out what they are, and have not been able to find anything that could not be performed by an existing official; and to suggest that the sheriff [depute] has a special value to Dover House because he is the man on the spot! Well he is not of course: it is only in two cases that he is the man on the spot [ie sheriffs depute of Lanark and Edinburgh]."<sup>31</sup>

Interestingly, the substitutes attempted to separate themselves from the governmental jurisdiction altogether, arguing that they were local judges, and not governmental officials. Their submission echoed Campbell's monograph of 1898<sup>32</sup>:

"The office of sheriff substitute was never intended to be an administrative one. It has only grown to be so - first by the indefinite phraseology of the Heritable Jurisdictions Act; second, by the concurrent raising of that office to that of an independent judge, and the neglect of administrative duties by the sheriff depute; and third by the customary habit of the legislature when putting down administrative duties of allowing them to be performed by the sheriff substitute".<sup>33</sup>

It is clear that the substitutes were rather more concerned than the deutes by the potential difficulties which could arise from independent judges such as sheriffs being entrusted with strong discretionary powers in local administration. Accordingly, they did not restrict themselves to arguing that the deutes should perform all the governmental functions, and suggested that some duties should be allocated to local authorities: "... the sheriff [depute] ought himself to discharge all the administrative

duties of the office, except when these must necessarily be performed by a local official".<sup>34</sup>

Viewed in theoretical terms, it might be argued that the substitutes' position was generally in accordance with the general principles advanced in chapter two.<sup>35</sup> It can also be suggested that their statements imply some appreciation of concepts such as ostensive judicial impartiality and competence.<sup>36</sup>

However, in the event, little of substance in terms of reform emerged from the Commission's deliberations: the sheriffs' role in local administration remained unchanged.<sup>37</sup>

## **Section Two: Case Law Developments**

Until Allen and Sons (Billposting) v Edinburgh Corporation in 1909<sup>38</sup>, there was no more willingness to give detailed consideration to the constitutional implications of the sheriffs' powers in court decisions, than elsewhere. As before, distinctions between "ministerial" and "judicial" powers were made, without any real attempt to define the nature of the classifications. It is never clear whether the court was attempting to avoid analysing functions deliberately, or felt that the distinctions which were made were self evident. Powers were distinguished after close interpretation of the provision and statute in question, but as the essential nature of decisions was rarely discussed directly, and never in any depth, judicial reasoning was usually flawed and circular. Typologies continued to be based on varying, subjective standards, and generalisations about the sheriff's historic governmental

role.

For example, Lord Mure, in McTavish v. Commissioners of Caledonian Canal<sup>39</sup>, which concerned the sheriffs' long standing role in poor law administration, seemed to view a ministerial role as being one which was merely executive. The sheriff was empowered to enforce the decision of a public authority, but had no discretion to vary the decision:

"... the sheriff acted ministerially merely in enforcing payment of the rates laid on by the Heritors and Kirk Session, and his duties were limited to that."<sup>40</sup>

Lord Ardmillan concurred with this definition of ministerial action, drawing upon the earlier cases of Calder<sup>41</sup> and Pollock<sup>42</sup>:

"When ... the sheriff proceeded, as he was bound, to enforce the resolutions of the Heritors and Kirk Session, he may be said to be acting only in an executive or ministerial character, the judicial function residing, in the first place, in the Heritors and Kirk Session, and in the ultimate resort in this court. Accordingly, the court held, and rightly held, in the case[s] of Calder, ..., and Pollock, ..., that the sheriff's function was purely ministerial."<sup>43</sup>

Lord Deas also seemed to view a ministerial power as being the non-discretionary confirmation and enforcement of a public authority's decision under statute when he stated; "... he [the sheriff] was simply bound to put his imprimatur on the proceedings [of the local authority in question], when called to do so, without examining them".<sup>44</sup>

However, it is plain from other decisions that sheriffs could exercise a discretion when reviewing local authority decisions and still be held to be exercising

a ministerial power<sup>45</sup>: the interpretation of the instant provision was the central concern of the court, and terminology was used without any real consistency or exactitude.

For example, that Lord Ardmillan had no firm analytical test of what constituted a ministerial decision, rather than one which was judicial, is illustrated by his rather vague remarks in Stirling and Ferguson v. Hutcheon and Others<sup>46</sup>, which was concerned with an irregularity in the exercise of the sheriffs' power to allow or disallow the adoption of a police system under the Police and Improvement Act 1862. After a brief consideration of the relevant provision, he commented obiter dicta: "It ... does look somewhat as if his duty were [sic] merely ministerial, but on this matter I would reserve my opinion."<sup>47</sup>

The courts also began to use the term administrative as an alternative to ministerial. This was a gradual process, and there is no apparent reason for the change. Importantly, however, functions which previously had been viewed as being final and privative judicial powers were included in the new classification, along with the more traditional ministerial duties. Echoing earlier cases concerning traditional ministerial functions, such as "striking" the fiars<sup>48</sup>, it was made clear by the Court of Session that when sheriffs were acting as administrative officials, their authority did not stem from their status as judges: their role was that of a "direct delegate of Parliament".<sup>49</sup> Accordingly, many of the sheriff's powers under nineteenth century police government legislation came to be associated with, and eventually indistinguishable from, the earlier ministerial tradition. This process was complete by the end of the century. For example, in Magistrates of Glasgow v. Glasgow

District Subway Co.<sup>50</sup>, Lord President Robertson, in deciding whether a statutory power to appoint an arbiter under the Glasgow District Subway Act 1890 was an administrative function, stated: "Nor does the selection of the sheriff [ie by the legislature], as the person vested with the choice, at all imply that he is to act in a judicial character. The sheriff is an administrative as well as a judicial officer, and there are incumbent upon him numerous duties which are not performed in his court."<sup>51</sup> To avoid unnecessary confusion, it is proposed, when appropriate, to use the term "governmental" as a general description which encompasses both ministerial and administrative categories.

Notwithstanding the hazy analysis of functions, if a power was held to be either administrative or ministerial (ie governmental), there were significant consequences: the Court of Session had no jurisdiction to review a sheriff's decision, unless he had acted ultra vires. The position of the sheriff was held in one case to be outwith the judicial process. Lord Justice Clerk Moncreiff made this point in Dubs v. Police Commissioners of Crosshill<sup>52</sup>: "... he [the sheriff] is sole judge [of the issue]. The whole [process] is a political rather than a judicial proceeding....."<sup>53</sup> Lord Ormidale concurred, and after giving close consideration to the relevant provisions concluded that: "... I cannot think that it was contemplated by the legislature that a proceeding of this kind should be litigated as an ordinary judicial process. The whole matter is local, and the duty which the local judge had to perform was more of an administrative than a judicial character."<sup>54</sup>

The lack of any clear definition of what constituted an administrative function gave rise to flawed logic. For example, in Lindsay v. Magistrates of Leith<sup>55</sup>, the



First Division considered the question of the nature and range of the sheriffs' power to revise local authority boundaries following an unopposed application under s.11 of the Burgh Police (Scotland) Act 1892. The court was of the view that the nature of the sheriff's power was administrative, rather than judicial: "Nothing can be clearer than that the duty which the sheriff has to perform here is administrative, and not in any sense judicial."<sup>56</sup> Unfortunately, this was a subjective clarity, and was not arrived at after any meaningful analysis of functions.

The approach of the court differed from that taken in McTavish<sup>57</sup> and Stirling<sup>58</sup> in that the sheriff was held to have a discretion over whether or not to grant the application.<sup>59</sup> It is, however, significant that the Court of Session was anxious to limit the sheriff's discretionary power. The sheriff was empowered to act as the local boundary authority, and was not implementing or reviewing the decision of a local authority. Nonetheless, it was unanimously held that the range of the power to alter boundaries was restricted, although ex facie the provision in question there was no particular reason for this to be the case. Lord President Robertson stated that:

"... it is quite plain from the terms of ss. 11 and 13, and also from the subject matter of these sections, that the sheriff is exercising an administrative power in altering boundaries, and he is only bound to do so if satisfied that a change is expedient .... his duty is to preserve the status quo, unless reason is shewen for the alteration."<sup>60</sup>

By the turn of the century, it had become increasingly common for the courts to interpret powers as "administrative", whilst at the same time limiting the powers



held ex facie under statute by the sheriffs.<sup>61</sup> Allen and Sons Billposting Ltd v. Lord Provost, Magistrates and Town Council of Edinburgh<sup>62</sup> provides a clear example of this trend, and is still an important precedent. The case concerned an appeal under the Edinburgh Corporation Act 1899 (as amended), which gave an "aggrieved party" the right of appeal to "the Sheriff" against the decisions of the Corporation over the granting of advertising licenses: the sheriff was empowered to grant the licence if the Corporation had acted "unreasonably". The sheriff's power was held to be administrative, rather than a "judicial, or legal capacity", as the statute provided for appeal to "the Sheriff" (as opposed to "the Sheriff Court"), and also because the sheriff could "pronounce such order regarding expenses as he may deem just."<sup>63</sup> The latter provision was held to imply that, because Parliament had seen fit to legislate for a special power to grant expenses, the relevant provision was outwith the normal judicial process, as the sheriff possessed that power under common law when sitting as a judge.<sup>64</sup>

That this is a narrow distinction was no doubt clear at the time. However, what makes the Allen case particularly important is that it provided Lord Low with an opportunity to give a general idea of what he felt were the main features of an administrative power. Although he was far from rigorous, he showed that what was termed an administrative function in the context of the sheriffs' jurisdiction was very different from what it has come to mean in the wider context of UK administrative law<sup>65</sup>:

"The sheriff is not to act in a judicial capacity in the ordinary sense; he is not to decide a question of law between the parties; he is not to review the decision of

the magistrates, in the sense of weighing decisions for and against, and deciding to which side the balance inclines. He is not entitled to interfere except in the one case when he is satisfied that the Corporation have not reasonably exercised their discretion under the Act."<sup>66</sup>

Lord Low recognised that the sheriff's discretion was "very delicate and somewhat invidious"<sup>67</sup>, presumably because, apart from the fact that reasonableness is a difficult concept in itself, it may be impossible to separate it from the other issues mentioned, notably "weighing decisions for and against".<sup>68</sup> However, the judgement is also interesting because the test of whether a sheriff can intervene directly in substantive merits or policy concerns anticipates Lord Greene's celebrated common law test of unreasonableness in Associated Provincial Picture Houses Ltd v. Wednesday Corporation<sup>69</sup>. Like Lord Greene, Lord Low appeared to be very concerned with issues which were at the heart of rule of law theory: in interpreting the intentions of the legislature, he emphasised the importance of external control of arbitrary power by independent judges, and the protection of individual freedoms through adjudication. Most importantly, he created a substantive law "mechanism" which severely limited the sheriff's discretion to intervene directly in the policy or merits aspects of the authority's decision:

"... I take it that it [the sheriff's jurisdiction] was conferred simply because it was thought right that some independent Judge in the responsible position of Sheriff of the County should have the power of correcting the determination of the Corporation and protecting the rights of the owners of property, if the Corporation (which is a body representing very many different and conflicting views and interests)

should, perhaps from excess of zeal to preserve the amenity of the city, capriciously or arbitrarily deprive an owner of a right to property."<sup>70</sup>

It is contended that Lord Low's judgement can be evaluated in the context of the rule of law theory and general principles set out in part one of the thesis. The legislation had provided for a statutory discretion which had the potential for a strong "direct political involvement"<sup>71</sup> and polycentric effect<sup>72</sup>: the sheriff was given general powers to intervene on the question of the "reasonableness" of the licensing decisions of an elected local authority. In order to limit this potential, the court "retreated" to the positivist ethos of secondary morality<sup>73</sup>, and sought to maintain the standards of ostensive judicial impartiality and competence<sup>74</sup> by creating a substantive law mechanism which required the authority's conduct to be "capricious or arbitrary" before the sheriff could involve himself in the consideration of merits or policy. A limitation of this type can be seen as being in accordance with the general principles for the judicial decision taking set out in chapter two. In this respect, the Allen decision developed the view articulated by Lord Deas in the mid-nineteenth century<sup>75</sup> - that the sheriff should limit his discretion when exercising governmental powers.

Before the Allen decision, some sheriffs had sought to limit their statutory discretion in a series of cases which can also be viewed as involving the potential for breach of the standards of ostensive judicial impartiality and competence. For example, in Morgan v. Corporation of Glasgow<sup>76</sup>, Sheriff Fyfe sought to stress the point that sheriffs could find themselves acting in such a way as to prejudice local democracy if they gave a literal interpretation to a governmental provision, and that

this must be presumed to be contrary to the intention of Parliament:

"..., the appellant desires to substitute the judgement of the sheriff for that of the Commissioners of Police acting under the very special powers given to them by Act of Parliament. To countenance this would be destructive of the usefulness of a great many of the provisions of Police Acts, and subversive to the principle of local government upon which these Acts rest, viz., that the parties best fitted to deal, in the first instance at least, with such questions affecting the public health of the city are the Police Commissioners placed in office by the citizens."<sup>77</sup>

However, not all agreed with this approach. As was noted in section one of this chapter, there was support in some quarters for the continuation of the sheriffs' strong discretionary powers in local administration. "The Limitations of the Judicial Functions of Public Authorities"<sup>78</sup>, which was published in 1930 by Lord President Cooper of Culross prior to his elevation to the Court of Session bench, provides another example of this perspective. Following on from his experience as counsel for the losing side before Lord Low in the Allen case<sup>79</sup>, Cooper commented at some length on the sheriffs' role in local administration, and was strongly supportive of their position. After noting the proliferation of public bodies and the implications this had for individual liberties, he noted that the "practice of constituting the "sheriff" as the appellate or confirmatory judicial authority in administrative questions is one of long standing in Scotland, though serious inroads have latterly been made by the central departments. This change is deeply to be deplored."<sup>80</sup>

The reasons for his concern and support for the sheriffs' position is to be found in fears with which both Dicey and Hewart would have been familiar, and which

were not altogether unfounded, although they may have been overstated: legal patriotism (though Scottish, rather than English), and the dangers posed to the rights of the individual by unidentified officials wielding discretionary power, which seems to have been confused with arbitrary power.<sup>81</sup> He was also a strong believer in the efficacy of court based adjudication as a decision taking process in the administrative arena:

"... the sheriff can be trusted not only to conduct the inquiry judicially [ie presumably in an adjudicatory style] and with cold impartiality, but also - and this is not less important - to create the impression that he is doing so. .... The proceedings are conducted formally but expeditiously and in the wholesome light of complete publicity, while the decision is customarily embodied in a reasoned judgement."<sup>82</sup>

He defended the ability of the sheriff to deal with administrative problems by arguing "I have yet to see an administrative issue more complex and technical than those which are daily arising in the Courts of law and being satisfactorily determined."<sup>83</sup>

It is difficult to avoid the impression that Cooper, in making these points, was overstating his case: his defence of the sheriffs' role took no account of either the suitability of sheriffs carrying out functions which could be interpreted as "unconstitutional" challenges to elected public authorities, or the suitability of adjudication as a decision taking process in public policy areas. Accordingly, his arguments can be criticised on the grounds that their adoption could run the risk of causing a breach of the standards of ostensive judicial impartiality and competence,

which could then have an indirect effect on the rule of law.<sup>84</sup> In this respect, Cooper's views are not dissimilar to those of Lord Scarman, as quoted in chapter one.<sup>85</sup> The significance of his opinions, which were developed on his elevation to the Court of Session bench, are considered in chapter seven.

### **Section Three: The Sheriff's Duties in Local Administration**

Sheriffs continued to hold substantial powers in local administration. The range of their jurisdiction remained as broad as before: when functions were allocated elsewhere, new governmental and judicial duties were created. For reasons of space, it is impossible to give a detailed account of the changes which took place during the period under consideration. However, the main developments are set out below, building on the material in section two of the previous chapter.

Parliament continued the sheriffs' involvement in: (i) the preservation of order; (ii) electoral law; (iii) local government; (iv) roads and bridges; (v) fiscal affairs; and (vi) miscellaneous business (eg "striking" the fiars, mental health and prison administration, and the supervision of the Northern Lighthouses). There were also a number of new functions allocated to sheriffs (eg in education and licensing): these are noted briefly in subsection (vii).

(i) The sheriffs' powers as regards the preservation of order received considerable attention in this period: indeed, they were seen as being the sheriffs' most important governmental function at this time.<sup>86</sup> This reflected the anxiety which was prevalent in some quarters concerning the possibility of political and social unrest.

The activities of Sheriff Ivory in the Skye of 1883-86 give some indication of just how seriously sheriffs were inclined to take their responsibilities. To the modern eye, his papers make astounding reading.<sup>87</sup> In order to control crofting disputes on the island, a Royal Navy destroyer, complete with detachment of Royal Marines, was deployed to augment the armed police who were already acting under the Sheriff's orders.<sup>88</sup> Assisted by his substitutes, he adopted a tough and rigorous

policy of confrontation, and sought to put down the crofters' rebellion by a show of military force.<sup>89</sup>

However, it was the miners' strike of 1921 and the subsequent General Strike of 1926 which presented sheriffs with a nation-wide threat of revolution. It would seem that they performed well as the "King's representative and Civil, Executive and Administrative Officer of the Crown"<sup>90</sup>. Shrieval powers were certainly considerable, and had remained virtually unchanged since the mid-nineteenth century.

Sheriff Crole, in his evidence to the 1927 Commission, indicated that the sheriffs' duties were far from being a sinecure:

"The duties of the sheriff in this regard have been heavy, owing to the unrest among the industrial population, the prevalence of strikes and of threatened strikes among large bodies of workers, and also the appearance of undesirable and disloyal elements".<sup>91</sup>

Lord Murray supported this view, stating that the "most important administrative duty which the sheriffs perform is in connection with civil disorder...".<sup>92</sup> Lord Dunedin was almost mystic in his assertion that the sheriffs depute were the most suitable officials to carry out this function:

"[Question] Is that [ie the control of the military and police in a riot] a matter where a lawyer is specially qualified to do these things?

Lord Dunedin: Not at all. It is not the lawyer part of him, it is part of his being. As I put it, sheriffs are men of common sense who have been in the county and know something about it, and can take responsibility on themselves."<sup>93</sup>

(ii) The sheriff's important position in electoral law remained essentially the same



as before.<sup>94</sup> The depute was the statutorily empowered electoral returning officer for his sheriffdom, which would usually contain a number of Parliamentary constituencies. He was required to advise the Secretary of State for Scotland regarding the places of election for each constituency, and was responsible for the division of the constituencies into polling districts, each of which was to have a designated polling place. Deputy Returning Officers (who were usually substitutes) were appointed, although the deputies were responsible for the overall conduct of elections at each polling station, the nominations, the delivering of the vote, and the administration of electoral expenses.<sup>95</sup>

(iii) The Local Government (Scotland) Act 1929<sup>96</sup> did not bring the sheriffs' multifarious responsibilities in local administration to an end. They continued to exercise a wide range of important governmental and judicial functions under the Burgh Police Acts, the most important of which were the Burgh Police (Scotland) Act 1892<sup>97</sup> and the Burgh Police (Scotland) Act 1903.<sup>98</sup> For example, s.145 of the 1892 Act allowed appeal by a property owner aggrieved by street improvements, s.237 permitted appeal from an owner affected by sewerage works, and s.339 gave a general right of appeal against the decisions of town councils where property was affected or a contribution was required towards the cost of work.

The 1892 Act continued the sheriffs' powers in the creation and constitution of burghs, and the establishment and alteration of boundaries within the burghs for electoral purposes.<sup>99</sup> As was the case with earlier burghal legislation, the 1892 Act "enabled" communities to adopt its provisions, rather than setting out mandatory requirements. Accordingly, it was left to a local vote to decide the issue: the

election was conducted by the sheriff serving, as in Parliamentary elections, as Returning Officer.<sup>100</sup> The last point of note with regard to the 1892 Burgh Police Act is that the sheriffs' important power to confirm the bye-laws of an established burgh council was continued by s.318.<sup>101</sup>

The sheriffs' inter-related powers in housing and public health were also maintained. Many of their duties in this area were effectively updated versions of the powers which were created in the early burgh police legislation. For example, the Housing of the Working Classes Act 1890<sup>102</sup> provided that sheriffs were to superintend housing inquiries with regard to properties which were "injurious to the health of the inmates or unfit for human habitation...".<sup>103</sup> The Public Health (Scotland) Act 1867 empowered them to "close" such properties<sup>104</sup>, and the Act of 1890 provided that sheriffs were to hear appeals from property owners aggrieved by a local authority order to demolish a condemned structure.<sup>105</sup>

The difficulties which sheriffs faced when exercising this type of power has already been commented on.<sup>106</sup> However, despite the criticism made of sheriffs by the 1917 Commission appointed to inquire into Scottish housing conditions, their jurisdiction was updated by the Housing (Scotland) Acts of 1925<sup>107</sup> and 1930.<sup>108</sup> For example, the Act of 1925 empowered sheriffs to make closing orders if they felt that a dwelling was not "in all respects reasonably fit for human habitation".<sup>109</sup> Similar provision was made under s.20 of the Act of 1930.

The late nineteenth century saw a remarkable development in public health legislation, and the Public Health (Scotland) Act 1897<sup>110</sup> was an important benchmark in this field of law. The sheriffs' governmental and judicial powers under

the Act were considerable, and complemented those held under burgh police and housing legislation.

For example, sheriffs could order the removal or remedy of a public nuisance<sup>111</sup>, and were responsible for setting boundaries for a variety of different purposes (eg drainage, water supply and scavenging).<sup>112</sup> They were also empowered to enter and inspect private property to ascertain whether or not they were a risk to public health<sup>113</sup>, and could suspend or prevent persons from carrying out a trade which could be a health risk.<sup>114</sup> Sheriffs continued their duties with regard to the regulation and closure of burial grounds.<sup>115</sup> Sheriffs also conducted public inquiries into a variety of matters under the 1897 Act when requested to do so by the Secretary of State for Scotland.<sup>116</sup>

(iv) Sheriffs continued to exercise their jurisdiction in the administration of roads and bridges<sup>117</sup>, despite the advent of County Councils and County Road Boards in 1890<sup>118</sup>, the Development and Roads Improvement Funds Act 1909<sup>119</sup>, and the Roads Improvement Act 1925.<sup>120</sup> Although they were no longer required to serve as County Roads Trustees after 1890<sup>121</sup>, they continued to exercise powers under the Roads and Bridges (Scotland) Act 1878.<sup>122</sup> As in other areas, sheriffs were utilised as both governmental and judicial officials in the same statute. For example, they were empowered to confirm bye-laws made regarding county highways, and hear appeals regarding the closure or abandonment of a highway.<sup>123</sup> Other duties included the "appointment of arbiters and valuers, and the determination of disputes or settlements on incidental questions of road management and administration."<sup>124</sup>

(v) For the most part, the sheriffs' duties as fiscal representatives of the crown

were of little importance by the beginning of the twentieth century, as "most of the accounts due to the crown [were] paid direct to or by the Exchequer or other crown department."<sup>125</sup> Sheriffs were, however, still required to render the accounts of the county to the Exchequer and to carry out Exchequer decrees.<sup>126</sup> In addition, they continued to serve as ex officio Land Tax Commissioners, Commissioners of Supply, and members of the Standing Joint Committees.<sup>127</sup> These offices were, however, abolished by the Local Government (Scotland) Act 1929<sup>128</sup>, which established the basic system of local government that was to remain in operation until 1975<sup>129</sup>; however, sheriffs continued to serve as ex officio General Commissioners for Income Tax in their counties or divisions.<sup>130</sup>

(vi) Many of the sheriffs' other governmental duties continued largely unaltered. They continued to "strike" the fiars annually<sup>131</sup>, and their duties in mental health administration were maintained.<sup>132</sup> Following on from strong shrieval representation on the nineteenth century Prison Board, the Sheriff of Perth continued to serve ex officio as a Prison Commissioner for Scotland.<sup>133</sup>

The eleven "maritime" sheriffs continued to serve as Commissioners for the Northern Lighthouses, and it would seem that they performed their duties efficiently. Nor was the responsibility light: in addition to the administrative business of attending board meetings, they were still obliged to inspect the lighthouses on a annual basis.<sup>134</sup>

(vii) A number of new functions were created. For example, sheriffs were empowered by the Education (Scotland) Act 1908<sup>135</sup> to hear appeals against school attendance orders. Their remit under this Act provides another good example of a

wide governmental power: "... any parent aggrieved by the making of an order under this section may appeal to the sheriff, who shall have the power to confirm or annul the order, and the sheriff's decision shall be final."<sup>136</sup>

Finally, the sheriffs' jurisdiction in registration and licensing was extended. In addition to their earlier powers to grant or refuse certain types of trading licenses<sup>137</sup>, the Licensing (Scotland) Act 1903<sup>138</sup> provided that sheriffs could grant, cancel or renew applications for club licenses. If there were objections to the granting of a licence, sheriffs could, at their own discretion, hear parties and reach such decision as they saw fit: the decision was final.<sup>139</sup>

### **Summary and Conclusion**

The late nineteenth century and early twentieth century saw important changes in the scale and structure of Scottish local administration. Large local authorities with wide powers and professional executives were established. By 1930, the authorities were elected by universal suffrage. On a national level, the growth of the Scottish Office and other government departments meant that the role of central government in local affairs became more pronounced. The sheriff's role, although still important, was no longer as significant as it had been. However, Parliament continued to allocate wide discretionary powers in local government. Although the origins of the sheriff's governmental function as local representative of the Crown were essentially feudal, there was no indication on the part of the legislature that the sheriff's position was anachronistic or inappropriate.

However, on the wider stage, the implications of the democratisation and growth of administration gave rise to constitutional tension: writers such as Dicey, Hewart and Cooper expressed the fear that administrative discretion could subvert Parliamentary democracy, the rule of law and basic liberal values.

Concerns of this nature seem to have had little real effect on the way that sheriffs and others saw the statutory jurisdiction in local administration. For the most part, the only references to it were made in the context of the petty and parochial dispute between sheriffs over remuneration and professional status. Although there does seem to have been a feeling among substitutes that many of their statutory functions could be allocated to public authorities, the argument was not taken very far, and was refuted by the deposes.

In judicial decisions, the sheriff's increasingly anomalous position did give rise to some interesting developments. Although for the most part decisions were confused and inconclusive, Lord Low's judgement in the Allen case showed a sophisticated appreciation of the constitutional difficulties which could arise from the allocation of strong discretionary powers to sheriffs in local administration. The precedent established by Allen can be viewed as being in accordance with the general principles for the exercise of judicial discretion and the rule of law theory set out in part one of the thesis. However, as will become clear in chapter seven, influential commentators such as Lord Cooper were in favour of a more aggressive interpretation of the sheriff's governmental role, and were less wary of sheriffs making direct interventions in local administration.

## **Chapter Seven: The Sheriff's Jurisdiction in Local Administration 1930-1970**

### **Introduction**

Following on from the pattern set out above, this chapter, which takes coverage up to the 1967 Grant Report on the Sheriff Court<sup>1</sup>, is divided into three sections. The first considers the arguments which were made concerning the sheriff's jurisdiction in local administration, and attempts to put them in the context of wider developments. The second examines the contradictory and rather complex case law of the period; and section three sets out a brief commentary on the main powers held by sheriffs.

### **Section One: Developments in the Sheriff's Powers 1930-1970**

Consideration of the sheriffs' role in local administration was, as it had been since the early nineteenth century, coloured by the continuing fracas between deputes and substitutes over professional status, and the use, by both sides, of the governmental jurisdiction as a means of either bolstering particular points of view, or denigrating others. Indeed, if anything, the tone of the debate had become even more petty and insular. This point was recognised by the Lord Advocate in his evidence to the Grant Committee:

"In Scotland, ... the approach to the problem is to some extent obscured, perhaps subconsciously, by regional jealousies, the existence of long-recognised interests and amour propre ... .... The desire to maintain or inflate status and its attendant rewards may result in a sheriff substitute hotly opposing any alterations in his jurisdiction other than those which appear to increase its importance."<sup>2</sup>



It is certainly clear that relations between at least some of the deutes and their substitutes was as strained as ever before. Sheriff Depute "A" was sympathetic to the substitutes' arguments:

"... the Sheriff Principal is the head of the Sheriffdom and the Sheriff Substitutes are under his control. Consequently, all communications intended for the latter must be sent through the Principal, just as you communicate with a private soldier through his Commanding Officer. The relationship between Principal and Substitute is almost feudal. It is most unfair to the latter and deprives him of the position he ought to have in his Sheriffdom."<sup>3</sup>

This was supported by the Memorandum of the Council of Sheriff Substitutes<sup>4</sup>, but the eccentric memoirs of Sheriff Depute Lillie<sup>5</sup> would appear to indicate that this was a not a view taken by all deutes. Writing as recently as 1970, he commented that: "... it was important that the Sheriff's resident representative, the Sheriff Substitute, should be a person who commended himself by his personal character more than he should be a person of exceptional intellectual powers. Integrity, humility, were the chief desiderata and in the main sufficed to meet the demands of his office."<sup>6</sup>

A similarly patronising approach was taken in the Sheriff Deutes' written evidence to the Committee, which is perhaps not surprising as Sheriff Lillie was their convener.<sup>7</sup> They argued that the office of depute was "far from being a sinecure, and he [the depute] performs a valuable and important role in the administration of justice and local government in Scotland."<sup>8</sup> The idea that substitutes could (and in fact did) perform most of the duties in local administration was rejected out of hand:



"Such part could not ... be carried out by the senior sheriff substitute of each sheriffdom. Lacking the authority and status of a sheriff, a sheriff substitute would not carry enough weight in his dealings with the Scottish Home and Health Department, with local authorities or even with the sheriff substitutes of his own sheriffdom."<sup>9</sup>

Sheriff Depute "B" also laid great emphasis on the importance of the deposes. In answer to a question which sought to determine the value of the deposes in the business of the sheriffdom, he stated that it "... seems to me that so much of the work which a sheriff has to do administratively should require some knowledge of the personalities of the sheriffdom, the way people live and the way people work, and I have found that by keeping in personal contact with different institutions in the sheriffdom, I have been in a far better position to know what to do...."<sup>10</sup>

The Committee did not, however, see the sheriffs' duties in local administration as being justification for the continuance of the office of depute. It recorded that, despite the fulsome reference of the deposes to their administrative duties, they accounted for approximately 5% of court time.<sup>11</sup> Even accounting for the relevance, or lack of it, of attempting to ascertain the importance of issues according to the amount of time taken up in court hearings<sup>12</sup>, the deposes' claims that they had a heavy workload in local government should be treated warily: "there were no statistics to show the amount of time spent by Sheriffs Principal on administrative duties."<sup>13</sup> In oral evidence, the Scottish Law Agents Society representative commented that he;

"... did not see a really busy Queen's Counsel in the Scottish Bar doing all his

administrative work and also being a Sheriff Principal. That was a point made in the 1927 Commission, that the sheriff [depute] did a tremendous amount of administrative work, ... I do not think there is any real evidence to show that he does. .... Where the Sheriff Principal acts, it tends to be on the advice of the sheriff substitutes and sheriff clerks."<sup>14</sup>

It would seem that the Committee implicitly accepted the view that much of the deputed' estimation of their own worth was unwarranted and inaccurate.<sup>15</sup> There was also - for the first time in an official report - concern over the involvement of sheriffs in the business of elected local authorities. The Second Meeting of the Committee noted that "administrative business, ..., does not give rise to much trouble, but there was support for the view that business of this kind might be transferred to local authorities."<sup>16</sup>

At a subsequent meeting, it was proposed that local authorities should assume the responsibility of administering local and parliamentary elections: this was, however, dismissed on the grounds that sheriffs had substitutes and clerks to assist them.<sup>17</sup> The rationale for divesting sheriffs of duties in local administration would not appear to have been based on any strong concern for constitutional integrity, but on shrieval enthusiasm for divesting themselves of minor and onerous duties.

For example, it was noted that planning appeals ought properly to go to the Secretary of State for Scotland, partially because there were recognised policy implications, but mainly because the sheriffs felt that the workload was too heavy.<sup>18</sup> Irksome duties such as registration and burial ground regulation were not popular with the sheriffs, but more weighty duties were defended vigorously in terms redolent of

Lord Cooper:

"We do not agree that appeals against certain local authority decisions in administrative matters should be transferred from the Sheriff (including the sheriff substitute) to the Secretary of State.... In such matters the right to appeal to the sheriff forms a valuable safeguard of the rights of the individual against the powers of the executive. In other words, if it really is an appeal against the decision of a local authority, we think it should be made with the sheriff."<sup>19</sup>

In supporting this, Sheriff Depute "C" pointed out that in an appeal to the sheriff, the appellant would "at least know who he is appealing to".<sup>20</sup> Where more minor duties were involved, the approach of sheriffs was, however, considerably more relaxed. Commenting in connection with the sheriffs' control over Sunday amusements in public parks, Sheriff Depute "D" felt able to concede that this was an area for local authorities alone:

"... certainly I think that it [ie such a minor function] is more appropriate to the local authority than to the sheriff because the local authority is there to interpret the wishes of the citizen, whereas the sheriff is not."<sup>21</sup>

The committee itself felt bound to give some consideration to the issue of the suitability of sheriffs continuing to exercise their governmental jurisdiction in local administration.<sup>22</sup> The result was almost a paraphrasing of Lord Cooper's views as set out in his "Selected Papers" and judgements.<sup>23</sup> As such, it is argued, the Report perpetuated the same flaws. The Committee (and the written and oral submissions made to it) gave little consideration to the potential difficulties for judicial impartiality and independence, or the integrity of adjudication as a decision taking process,

which could arise from the exercise of governmental powers. It made only a half hearted attempt to tackle the central questions of whether, or to what extent, a judge should be able to interfere with the policy and merits of a local authority's decision, and whether adjudication was a suitable decision-taking process in such cases.

The Report recommended that sheriffs should continue to exercise their "administrative" role in local administration. Indeed, the sheriffs' role was strongly supported in a passage which could almost have been taken straight from Lord Cooper's paper of 1930:

"We think the sheriff has three qualifications which determine his capacity to dispose of administrative or quasi-administrative work. First, he is a legally qualified professional judge, and therefore particularly competent to deal with matters having a legal content; secondly, he operates in a particular locality and possesses local knowledge; thirdly, by virtue of his appointment he is independent of any public authority or private individual in his area. Those characteristics are, par excellence, those of the arbiter in local disputes...."<sup>24</sup>

In adopting this view, the Committee made it clear that it was not prepared to recommend to Parliament that sheriffs should no longer be given the power to review merits or policy based decisions taken by local authorities. It had been argued that sheriffs should be limited in these cases to the formula set out in the Second Report of the Guest Committee on Scottish Licensing Law.<sup>25</sup> This had recommended that in appeals from the decisions of the licensing authorities, the grounds of appeal should be limited to what was, in effect, a statutory formulation of the grounds for common law judicial review: the sheriff would have been unable to interfere with a

decision "unless he was satisfied that a decision was wrong in law, or ultra vires, or in some respect fundamentally bad or, alternatively, that it was such as to represent an altogether unreasonable exercise of discretion by the licensing court on the basis of the facts before them."<sup>26</sup> This proposal was, however, rejected by the Committee on the grounds that it would be unacceptable to prevent sheriffs from hearing evidence and settling questions on the facts if the original decision taken by a public authority had not involved a "public hearing of evidence".<sup>27</sup>

It was nonetheless attempted to recommend some sort of compromise which would clarify the extent of shrieval discretion to review local authority decisions. Unfortunately, the Report's solution can be likened to whistling for a wind:

"We recommend that, in the creation of new administrative appeals to the sheriff, or in the revision of existing legislation which provides for such appeals, the enabling statutes should clearly define the extent of the appeal and the powers of the sheriff to interfere with the original decision."<sup>28</sup>

As will be made clear in parts three and four of the thesis, the failure of the Report to consider the central issue of whether it is appropriate for an independent judge such as the sheriff to be put in the position of deciding on the merits or policy content of local authority decisions has resulted in a considerable degree of confusion, which has persisted to this day.

## **Section Two: Case Law Developments 1930-1970**

Interestingly, the court itself was no more concerned by these issues than the Grant Report. It is important to note that the direction taken by the court in the period

under consideration was significantly altered due to the efforts of one judge in particular: Lord President Cooper of Culross.

Lord Cooper's interest in the sheriffs' duties in local administration has already been commented upon. During his tenure of high judicial office, he developed and implemented the views expressed as counsel in Allen and Sons (Billposting)<sup>29</sup> and "The Limitations of the Judicial Functions of Public Authorities"<sup>30</sup> in two important decisions: Glasgow Corporation v. Glasgow Churches Council<sup>31</sup>, and Arcari v. Dunbartonshire County Council<sup>32</sup>. In so doing, he provided the authority for sheriffs to exercise strong discretionary powers in local administration at a time when the natural trend of precedent had been leading to a gradual rejection of any direct role for sheriffs as judges of merits or policy. The trend set by Lord Deas in the mid-nineteenth century, and established by Lord Low in the Allen case, required that sheriffs limit the extent of their discretion in governmental cases to the review of "capricious and arbitrary" decisions.<sup>33</sup> In theoretical terms, this interpretation of their discretion was (and still is) largely inoffensive to ostensive judicial impartiality and competence, the positivist ethos of secondary morality and wider rule of law theory.<sup>34</sup> However, Lord Cooper took a different view. His efforts have ensured that modern sheriffs are still unclear as to the extent of their discretion to interfere with the merits or policy implications of local authority decisions. Consideration should be given to the series of cases which brought this situation about.

As indicated above, prior to the Glasgow Corporation v. Glasgow Churches Council case, the courts followed the trend set in Allen and previous cases. Sheriffs were typically wary of any direct involvement in issues which could have involved

them in a clash with the merits or policy based decisions of increasingly professional elected local authorities. For example, in Henry Butler v. The Corporation of the City of Glasgow<sup>35</sup>, Sheriff Dods felt that unless it was clear that the local authority had acted "capriciously and arbitrarily", he was not suitably qualified to assess the merits of the decision which had been recommended by council officials. He was very conscious of the inability of the adjudicatory process to provide him with a high standard of ostensive judicial competence:

"The department of the Corporation which is entrusted with the inspection of sanitary conditions in the city must be regarded as an expert department, and I should, a priori, be very slow to reverse any finding to which that department had come. .... In the present appeal, I find my inexpert judgement in line with the expert finding of the department."<sup>36</sup>

However, this approach was turned on its head by Sheriff Black in General Billposting Co Ltd v. Glasgow Corporation<sup>37</sup>. He decided that sheriffs were not precluded from taking decisions on the policy merits of the case. He felt that when acting administratively (ie as a governmental official), sheriffs were entitled to interpret their statutory powers to reverse the decision of a local authority literally, and that they did not have to concern themselves with a self imposed limitation of discretion:

"I reject altogether the respondent's [ie the Corporation's] contention that I have no power to review their decision on the merits. That view, if sound, would render negative the obvious purpose for which an appeal is allowed and would deprive the provision that the Sheriff may pronounce such order as seems just of any



intelligible meaning."<sup>38</sup>

In The Corporation of the City of Glasgow v. Glasgow Churches' Council<sup>39</sup>, the Second Division of the Court of Session, and Lord Cooper (then Lord Justice Clerk) in particular, gave a robust defense of this interpretation of the sheriffs' jurisdiction<sup>40</sup>, thereby ensuring that the view that sheriffs could overturn the policy or merits based decisions of elected local authorities when acting as a governmental officer did not become an anachronism.

The appeal was brought by the city corporation following a decision by Sheriff Black that he was entitled to review the merits of a corporation bye-law enacted under the Glasgow Public Parks Act 1878 and the Glasgow Corporation and Police Act 1895 as the statutory confirming authority. The corporation sought to advance the argument that as the sheriff was a legally qualified judge, Parliament had intended his review function to be limited to an evaluation of whether the bye-law was constituted in such a way as to be challengeable in a court of law.<sup>41</sup> However, Sheriff Black's interpretation of his remit was fully supported by both the Lord Ordinary (Patrick)<sup>42</sup>, and the Second Division<sup>43</sup>. It would seem that in the mid 1940s, the court was less perturbed by the question of the appropriateness of an independent judge involving himself overtly in the consideration of the merits based decisions of local authorities than it had been previously. Had the court chosen to continue the restrictive interpretation of the sheriffs' jurisdiction, it would have shown itself sensitive to the views of those, such as Lord Deas and Lord Low, who had voiced the concern, albeit indirectly, that overt interference in policy issues could be construed as being "unconstitutional".<sup>44</sup>



However, the Lord Ordinary took the view that sheriffs possessed, like any other statutorily empowered confirming authorities, a strong discretion. He was unwilling to concede that the sheriffs' status as independent judges meant that they should be limited to considering purely "legal" issues:

"... bye-laws are sometimes subject to confirmation by the Sheriff of the county, sometimes by the Secretary of State for Scotland, or other departmental authority. Sometimes confirmation by both the Sheriff and the Secretary of State is necessary. The statutes which give the power to make bye-laws and to confirm them do not in general place any limit on the considerations which the confirming authority should have in view ...".<sup>45</sup>

This amounted to a literal reading of the sheriffs' statutory authority, rather than one which sought to infer a jurisdiction restricted by albeit vague standards of constitutional propriety:

"... Parliament has delegated the power to legislate in limited matters to the Corporation and the Sheriff. In determining whether to confirm a bye-law, the sheriff acts in an administrative capacity, with a wide discretion."<sup>46</sup>

What might have given rise to this rather bullish perception of the sheriffs' authority? The answer to this question is perhaps to be found in the 1931 edition of "Greens' Encyclopaedia of the Laws of Scotland". In it, Lord Wark, a judge of the Second Division, wrote an authoritative title on the administrative and ministerial powers of the sheriff.<sup>47</sup> He commenced rather dramatically by stating that the "Sheriff in Scotland is both a judicial and an administrative officer. In the former capacity he is the local judge of the bounds, and in the latter he is the King's

representative and executive officer for civil affairs."<sup>48</sup> He then went on to discuss the different powers of the sheriff in some detail, giving considerable weight to the historical pedigree of the jurisdiction in local administration and the prominent position of sheriffs in county hierarchy. It is not unreasonable to suppose that his occasionally pompous assessment of the sheriffs' role may have been influential in shaping judicial perceptions in subsequent judgements: there is no other readily available explanation for the shift away from Lord Low's restrictive interpretation of the administrative jurisdiction.

Lord Wark still held office at the time of the Glasgow Churches' Council case, and continued to sit in the Second Division when the case was heard. However, he died shortly afterwards. Accordingly, there was a rehearing, and Lord Cooper (who was by this time Lord Justice-Clerk) replaced him.<sup>49</sup> He took full advantage of the opportunity not only to re-state Lord Wark's description of the sheriffs' authority, but also to implement his own views as previously expressed.<sup>50</sup>

Accordingly, he strongly criticised the pleas advanced by the Corporation, stating that they "involved a misconception of the office and authority of the Scottish Sheriff".<sup>51</sup> Describing the contention that the duty of the sheriff under the relevant statutes was to confirm the "legal validity" of bye-laws as a "violent supposition"<sup>52</sup>, he went on to support Lord Patrick and Sheriff Black using Lord Wark's introduction to his encyclopaedia title as authority.<sup>53</sup> His dismissal of the reclaimers' arguments shows just how emphatically he felt that sheriffs should be able to consider the merits of local authority decisions or bye-laws:

"..., It [ie Lord Wark's introduction] exposes the fallacy of the suggestion so

earnestly pressed upon us that a remit to a Sheriff is a remit to a purely judicial officer, who is "only a lawyer", and on that account assumedly incapable of dealing with anything but purely legal issues".<sup>54</sup>

It is difficult to avoid the impression that Lord Cooper was reworking his 1930 article<sup>55</sup>, but in a court judgement, rather than a collection of essays: similarly, it must be wondered if having lost the Allen case before Lord Low was a motivating factor when writing his decision.<sup>56</sup> In any case, as before, there was no consideration of the potential implications of his approach for the independence or impartiality of sheriffs, or of the ability of an adjudicator to evaluate the polycentric implications of decisions satisfactorily.

However, Lord Cooper was not alone in taking this approach. Lord Jamieson, in a very clear judgement, upheld the Lord Ordinary's decision, and placed emphasis on the importance of the sheriffs' historic role in local administration<sup>57</sup>:

"The appointment of the Sheriff as the confirming authority may readily be accounted for by the fact that after 1746 there was no Minister in charge of purely Scottish affairs until the passing of the Secretary for Scotland Act 1885, and no departmental authority in Scotland suitable to deal with the matters with which the Acts were concerned."<sup>58</sup>

On his elevation to Lord President<sup>59</sup>, Lord Cooper went on to give an authoritative re-statement of when the court would hold that sheriffs were entitled to exercise a wide power of review in Arcari v. The County Council of Dunbartonshire<sup>60</sup>. The case concerned the question of whether an appeal to the sheriff from the decision of the County Council under the Town and Country Planning

(Interim Development) (Scotland) Act 1943 was judicial rather than administrative, and therefore appealable to the Court of Session. After commenting that "the sheriff has been employed from the earliest times, and to an increasing extent in recent years, in the discharge of multifarious functions which are more administrative or ministerial than judicial", he concluded that the answer to the question of how sheriffs were to interpret their powers was to be "found in the provisions of the statute in question."<sup>61</sup>

In a highly significant passage, Lord Cooper provided a consolidation of the different statutory "clues" which had been used by the court in previous decisions as a means of distinguishing their role. Although not necessarily conclusive, various features can be extrapolated and summarised as follows.<sup>62</sup> First, does the provision involve the sheriff in what may loosely be termed "local administration"? Second, do the proceedings originate in the Sheriff Court (ie out of an ordinary action)? Third, does the provision refer to "the Sheriff", or the "Sheriff Court"?<sup>63</sup> Fourth, is the sheriff's power of decision ex facie wide and final? Finally, are special provisions made for the sheriff to award expenses? If some or all of these features are present, then the sheriff may feel that he is able to interpret his power as being administrative. However, the nub of the distinction was rather more abstract: the central issue was whether "... there is in a real sense a true lis between the authority who seek to enforce the status quo and the citizen who seeks to assert his civil right to the uncontrolled use and enjoyment of the subjects which he owns or occupies."<sup>64</sup>

Clearly, the distinguishing of a "true lis" from one which is untrue can be viewed as raising extremely difficult theoretical issues: these are considered in

chapter nine.<sup>65</sup> At this stage, it is sufficient to note that, beyond setting out the "clues" noted above, which might be of use in statutory interpretation, Lord Cooper did not provide any further guidance.

Following from the Glasgow Churches case, he implicitly argued that the designation of a statutory provision as "administrative" can then entitle the sheriff to exercise a wide discretion on review, notwithstanding the fact that this may involve conflict with an elected local authority's evaluation of merits or policy.<sup>66</sup>

Realisation of the implications of these judgements may have motivated Lord President Clyde, in the subsequent case of Kaye v. Hunter<sup>67</sup>. The case concerned the question of whether a sheriff's decision under the Firearms Act 1937 was final (ie administrative) or subject to appeal to the Court of Session (ie judicial). Pointing out that "there is no single criterion which can be regarded as the conclusive test of whether it is the administrative or the judicial capacity of the sheriff which is being invoked"<sup>68</sup>, he went on to attempt to develop Lord Cooper's distinction:

"If what is appealed is in a real sense a true lis between the parties, so that the sheriff has to pronounce a judgement between the respective claimants, then the appeal involves invoking the sheriff in his judicial capacity .... If ... the sheriff has not really to decide a question of law between the parties, and has not to review the determination appealed to him in the sense of weighing the considerations for and against, and deciding which way the balance inclines, but if he is only entitled to interfere with what has been done provided he is satisfied that a discretion conferred by the statute has not been reasonably exercised, then the appeal is to him in his administrative capacity."<sup>69</sup>

What is significant about the judgement is that, without expressly distinguishing the approach taken in Glasgow Churches<sup>70</sup>, the view that sheriffs, when acting administratively, have a wide on the merits of the case discretion is sidelined. Instead, Lord President Clyde revived Lord Low's test of "reasonableness" as set out in Allen: "... for in [an administrative] case the appeal is given ... not primarily to determine a legal issue which has arisen between two contestants, but to provide machinery to protect the citizen from a capricious or arbitrary exercise of a discretion conferred on an official or on a public authority."<sup>71</sup> There was no mention of the sheriffs' jurisdiction being founded on the antiquarian research of Lords Cooper and Wark.<sup>72</sup> Instead, the test is one which bears a close similarity to those which are now routinely applied under Wednesbury unreasonableness<sup>73</sup> or Lord Diplock's test of "irrationality"<sup>74</sup>. As such, it is much closer to the ideal judicial function in the theory and general principles of the rule of law, which maximise the positive virtues of adjudication as a decision taking process, and minimise the dangers for ostensive judicial impartiality inherent in judicial involvement in the merits and policy of local authority decisions.

Notwithstanding these advantages, the decision remains problematical. The difficulties arising from Kaye v. Hunter are that Lord President Clyde did not expressly disapprove of the approach taken in Glasgow Churches Council<sup>75</sup>, and the fact that his interpretation of the sheriff's position as administrative was rather tenuous. He appears not to have taken account of the point that the sheriff's discretion in the Allen case was based on a reasonableness test<sup>76</sup>, and that when hearing firearms appeals, the sheriff must "pronounce a judgement between the

respective parties."<sup>77</sup> These flaws have led to a considerable degree of confusion amongst sheriffs, a point which is developed in parts three and four below.

### **Section Three: The Sheriff's Duties in Local Administration 1930-1970**

Although the overall significance of the sheriffs' powers in local administration waned, the number of duties which they were statutorily empowered to perform did not decrease greatly. In 1967, it was seen as "almost automatic"<sup>78</sup> for the legislature to provide for an appeal to the sheriff for citizens aggrieved by local authority decisions. Both the Grant Report<sup>79</sup> and sheriff court practice texts<sup>80</sup> of the time give a clear impression of the extent (if not the nature) of the sheriffs' jurisdiction.

Following on from the pattern established in previous chapters, this section provides a brief commentary on the sheriff's powers in the period under consideration. They are set out under the following general headings: (i) public order; (ii) electoral law; (iii) fiscal duties; (iv) local government; (v) roads and bridges; (vi) mental health and prison administration; (vii) education; (viii) licensing; and (ix) miscellaneous functions (eg lighthouse administration and "striking" the fiars).

(i) Sheriffs continued to exercise powers relating to the maintenance of the peace and public order.<sup>81</sup> The Grant Report, in its review of the 1927 Report on the Court of Session and the Office of Sheriff Depute, did not place much value on them: it was felt that their erstwhile importance had been a function of the troubled nature of the times.<sup>82</sup> However, under the Public Order Act 1936 sheriffs could empower procurators fiscal, the police and others to enter premises which were "associated with [the] activities of organisations which might usurp [the] functions of the police or armed forces, or use forces promoting political action."<sup>83</sup> The Licensing (Scotland) Act 1959<sup>84</sup> provided that sheriffs could order licensed vendors of liquor to close down for a specified period if a riot was taking place or anticipated.



Although the sheriffs' role as an ex officio member of the Police Committees and Standing Joint Committees disappeared with their abolition, they continued to exercise a number of controls over police forces in their sheriffdoms. Under the Police (Scotland) Act 1956<sup>85</sup>, sheriffs were entitled to issue instructions to Chief Constables, receive copies of the Chief Constables' annual report, and order the police to produce special reports when required.<sup>86</sup> They also settled any disputes regarding the constitution of police authorities and any costs due to them.<sup>87</sup>

(ii) The deutes' traditional jurisdiction in electoral law was maintained by the Representation of the People Act 1949.<sup>88</sup> Sheriffs depute continued to serve as Electoral Returning Officers<sup>89</sup>, and a clear picture of the nature and extent of their duties was given by Sheriff Depute Lillie in his autobiography.<sup>90</sup> However, as before, and despite Sheriff Lillie's best efforts to give a contrary impression, it would seem that much of the administrative work was undertaken by the substitutes and sheriff clerks. Indeed, the sheriff clerks took the opportunity afforded by the Grant Committee to voice their dissatisfaction at the lack of recognition given to their efforts:

"... just over one third [of sheriff clerks] were opposed to [participation in Parliamentary elections] .... because by and large it is the Sheriff Clerk who carries the election, and this ought to be said and we say it."<sup>91</sup>

This view was supported by Sheriff Substitute "E", who commented in oral evidence that "... it would certainly be agreed by anybody who knows anything about it, the whole burden falls upon the sheriff clerk and his department."<sup>92</sup>

(iii) As noted above, the fiscal duties of the sheriffs were much reduced, although

a number of responsibilities remained. At the time of the Grant Report sheriffs continued to serve as ex officio General Commissioners of Income Tax.<sup>93</sup> Their historic role as executor of Royal decrees and collector of payments made to the Crown under the Exchequer Court (Scotland) Act 1856<sup>94</sup> was also continued, although it was of little practical significance by this time.

(iv) The sheriffs' substantial powers in local government were continued, although there were a number of changes. Notwithstanding the retention of their duties in the inter-related fields of burgh and "police" government, housing, planning, and public health, some important duties were re-allocated. For example, the contentious role of bye-law confirming authority for local authorities was withdrawn by the Local Government (Scotland) Act 1947, and sheriffs were replaced by the Secretary of State.<sup>95</sup>

Despite this, the 1947 Act continued the traditional provision making sheriffs responsible for the fixing or rectifying of burgh boundaries, and the creation of new burghs.<sup>96</sup> They also heard appeals from disqualified councillors<sup>97</sup>, and from those aggrieved on public health grounds by county council proposals to vary "special districts".<sup>98</sup> Section 374 provided for a general right of appeal to the sheriff.

A number of the provisions in the Burgh Police (Scotland) Act 1892<sup>99</sup> were still in force at the end of the period under consideration. Appeals could be made to the sheriff against local authority decisions in public health<sup>100</sup> and planning.<sup>101</sup> Sheriffs were also able to review municipal council decisions where private property was affected, or where the local authority demanded payment for costs incurred for work carried out by it.<sup>102</sup> The Act also provided for an appeal to the sheriff against

entries, alterations or omissions in burgh street registers.<sup>103</sup> Finally, sheriffs could be called upon by the Secretary of State for Scotland to conduct local inquiries under the 1892 Act, as amended by the Burgh Police (Scotland) Act 1903.<sup>104</sup>

Similarly, many of the sheriffs' powers under the Public Health (Scotland) Act 1897<sup>105</sup> continued to be in force. Sheriffs could be called upon to take decisions in appeals against local authorities in cases involving sewers and drains<sup>106</sup>, scavenging<sup>107</sup>, common lodging houses<sup>108</sup>, nuisances<sup>109</sup>, and claims for compensation.<sup>110</sup> A number of duties under the Milk and Dairies (Scotland) Act 1914<sup>111</sup> and the Slaughter of Animals (Scotland) Act 1928<sup>112</sup> were continued, as were the sheriffs' powers under the Burial Grounds (Scotland) Act 1855.<sup>113</sup> The public health jurisdiction was if anything expanded: new duties were created under the Water (Scotland) Act 1946<sup>114</sup>, the Clean Air Act 1956<sup>115</sup> and the Rivers (Prevention of Pollution) (Scotland) Act 1951.<sup>116</sup>

The closely related jurisdiction in housing and local planning was updated and continued.<sup>117</sup> The Housing Act 1950 empowered sheriffs to hear appeals concerning clearing, closing houses, granting demolition orders, and conversions.<sup>118</sup> The Housing (Repairs and Rents) (Scotland) Act 1954 enabled landlords to appeal to the sheriff against certificates of disrepair issued by the relevant local authority<sup>119</sup>, and the Housing and Town Development (S) Act 1957 provided for a shrieval appeal for those aggrieved by a local authority's refusal to contribute towards house maintenance costs when a house was subject to a demolition or closing order.<sup>120</sup>

Following on from their still extant involvement with general planning, a number of minor duties were allocated to sheriffs under the Town and Country

Planning (Scotland) Act 1947: an appeal lay to the sheriff from those aggrieved by a local authority decision to change or undo work carried out without, or in breach of, planning permission, and there was also a right of appeal against compulsory purchase orders made in respect of structures of historic or architectural interest.<sup>121</sup>

(v) Despite sweeping changes in the administration of roads and bridges in the century between 1850 and 1950<sup>122</sup>, sheriffs continued to exercise a jurisdiction under the Roads and Bridges (Scotland) Act 1878.<sup>123</sup> Their powers to hear appeals from ratepayers aggrieved by the decisions of local authorities to close public roads, remove roads and bridges from the public list, and to make certain orders, prohibitions and authorizations were still in force in the late 1960s.<sup>124</sup> Similarly, they were still empowered under the Act of 1878 to appoint arbiters and valuers, and to determine damages when appropriate.<sup>125</sup>

New powers of a governmental nature were created by the Roads Improvement Act 1929, the Highways (Provision of Cattle Grids) Act 1950<sup>126</sup> (to be read in conjunction with the Road Traffic Act 1930), and the Road Traffic Act 1960.<sup>127</sup>

(vi) The long-standing jurisdiction held by the sheriffs in mental health and prison administration was continued.<sup>128</sup> The Mental Health (Scotland) Act 1960<sup>129</sup> confirmed the sheriffs in their central role in mental health provision. Sheriffs were empowered to commit a person suffering from a mental disorder to hospital or guardianship<sup>130</sup>, and could hear appeals regarding discharge from hospital.<sup>131</sup> In addition to these weighty powers, the sheriffs held a number of governmental duties under the Act<sup>132</sup>: they also continued to certify to presbyteries or church courts whether a minister was suffering from a mental disorder under the Church of Scotland

Courts Act 1863.<sup>133</sup> A related provision under the National Assistance Act 1948, although more a derivative of the sheriffs' powers in poor relief than mental health, gave to the sheriff the power to order the removal to hospital or other "suitable place" of those who were too elderly or infirm to care properly for themselves.<sup>134</sup>

Shrieval powers in prison administration were, by the end of the period under consideration, virtually defunct, although sheriffs continued to serve on probation committees.<sup>135</sup> However, one other significant governmental power did remain: sheriffs were empowered to visit and inspect prisons in their sheriffdoms, or in sheriffdoms where prisoners were being held for offenses committed in their jurisdiction.<sup>136</sup>

(vii) Sheriffs also saw their powers in education updated.<sup>137</sup> They were empowered under the Education (Scotland) Act 1962<sup>138</sup> to hear appeals from parents aggrieved by a local authority attendance order.<sup>139</sup> In addition, there was a right to appeal to the sheriff in cases where the authority had failed to reach an early decision and where the authority had refused to withdraw a child from a special school or failed to reach an early decision on the matter.<sup>140</sup>

(viii) The sheriffs' duties in registration and licensing continued to evolve.<sup>141</sup> Vestiges of their old jurisdiction remained in the Registration of Births, Deaths and Marriages (Scotland) Act 1965.<sup>142</sup> There was an appeal to the sheriff from the Registrar<sup>143</sup>; orders could be issued to informants and the Registrar General; and the sheriff could authorise a search of a Registrar's office on his demitting office.<sup>144</sup> Sheriffs continued to exercise a special jurisdiction with regard to the registration of marriages.<sup>145</sup>

The Licensing (Scotland) Act 1959<sup>146</sup> continued the sheriffs' role as the licensing authority for private clubs, which had been established by the Licensing (Scotland) Act 1903.<sup>147</sup> The Act also empowered licensing courts to make bye-laws which were subject to the confirmation of the Secretary of State for Scotland: he in turn was able to order sheriffs to conduct inquiries into the proposed legislation on his behalf.<sup>148</sup>

Appeals could be made to sheriffs under the Betting, Gaming and Lotteries Act 1963 in the event of licences or permits being refused by the relevant local authority.<sup>149</sup> A considerable number of similar duties were provided for by a series of Acts which regulated widely varying activities.<sup>150</sup> These provisions highlight the continued use of the sheriffs as judicial and governmental officials.

(ix) Sheriffs depute continued the practice of serving as Commissioners of the Northern Lighthouses.<sup>151</sup> They were still required to undertake the annual voyage of inspection, and it is clear from the memorandum presented to the Grant Committee by the sheriffs depute that they were assiduous in their duties, attending meetings far more frequently than other Commissioners, and shouldering a considerable degree of administrative responsibility.<sup>152</sup> The diaries of Lord Stott, however, suggest that the annual voyage of the commissioners was more in the nature of recreation than work.<sup>153</sup>

### Summary and Conclusion

The period 1930-1970 saw little change in the way in which the sheriff's jurisdiction in local administration was viewed: it continued to be used to justify the

arguments of both deputed and substituted in their increasingly vitriolic exchanges over professional status. The parish pump nature of debate ensured that there was little real consideration given to the wider implications of the suitability of judges exercising discretionary powers of review over the policy or merits based decisions of elected local authorities and their professionalised executives. Even by the late 1960s, the attitudes and arguments of the protagonists were, almost unbelievably, indistinguishable from those which had been made with equal force one hundred years before - despite the enormous changes in the scale and nature of local administration.

Although there was more development in case law, the result was far from positive. By 1970, sheriffs were faced with a confusing mix of convoluted and conflicting precedent when trying to set limits on their discretion in governmental appeals. This was largely due to the efforts of Lord Cooper, who was instrumental in initiating a series of authoritative Court of Session decisions which conflicted with the approach developed by Lord Low in the Allen case at the turn of the century. Lord President Clyde's decision in Kaye v. Hunter did little to resolve the situation.

Although the overall significance of the sheriff's jurisdiction in local administration had lessened, and a number of important functions had been allocated elsewhere, Parliament continued to provide for new powers, and the number of duties was still significant. Other than making a vague and rather unhelpful recommendation, the Grant Committee failed to give direct consideration to the suitability of sheriffs exercising powers which required direct review of the policy or merits based decisions of local authorities.

As will become clear in subsequent chapters, all these problems are still live

concerns for modern sheriffs exercising statutory powers in local administration.



## **Part Three**

### **Introduction**

As indicated in the Introductory Chapter, this part of the thesis evaluates the powers held by modern sheriffs in Scottish local administration. It is divided into three chapters. Chapter eight provides general consideration of the main developments in the sheriff's jurisdiction since 1970. An analytical framework of powers is set out in chapter nine, and the sheriff's current powers are allocated to appropriate categories. The analytical framework is based on the general principles and rule of law theory set out in part one, and the historical material considered in part two. The results of a fieldwork exercise carried out in twelve sheriff courts in 1986/87 are then discussed in chapter ten: the data gives a detailed picture of the frequency with which the sheriff's powers in local administration are exercised, thereby providing a degree of perspective for the empirical research which is set out in part four.

## **Chapter Eight: The Powers of the Modern Sheriff in Local Administration**

### **Introduction**

Discussion in this chapter is in general terms: the detailed consideration of individual provisions is set out in chapters nine and ten below, and in part four of the thesis.

There was no review of the sheriffs' powers following the Grant Report.<sup>1</sup> The jurisdiction in local administration continued to develop in an ad hoc, unstructured fashion. It would have been surprising if it had been otherwise, as the Report had not recommended any sweeping changes. However, there are two areas which should

be noted: the points which are made are then summarised in a brief conclusion.

### **Section One: General Developments Since 1970**

Although the sheriff's governmental and judicial powers in local administration were continued and many are still weighty and controversial, their overall significance has declined. The sheriff's duties as local representative of the Crown have become less relevant. The executive functions which derived from the ministerial jurisdiction of the pre-1747 heritable sheriffs are now comparatively few and minor. For example, the sheriff's function as Electoral Returning Officer was re-allocated to local authorities under the Returning Officers (S) Act 1977, despite the Deputes' recommendation to the Grant Committee that it should be continued.<sup>2</sup> It has already been noted that sheriffs had lost their power to confirm or refuse local authority bye-laws.<sup>3</sup> A number of other functions, such as "striking" the fiars, were brought to an end.<sup>4</sup> However, sheriffs continue to serve as Commissioners for the Northern Lighthouses.<sup>5</sup> They also serve as the licensing authority for private clubs<sup>6</sup> and continue to order compulsory hospitalisation of the mentally ill.<sup>7</sup> Detailed consideration will be given to the sheriffs' powers in licensing and mental health in chapter eleven: at this point, it need only be noted that sheriffs no longer hold any executive power to supervise and direct large-scale administrative processes on behalf of the Crown.

The powers which remain are diverse, and derive mainly from the duties allocated under nineteenth century local improvement legislation.<sup>8</sup> Many provisions give sheriffs the power to hear appeals from "persons aggrieved" by the decisions of

public (usually local) authorities. The subject matter of appeals varies widely, as do the grounds of appeal and the extent of the sheriff's discretion. For example, local authority decisions on matters as multifarious as licensed premises<sup>9</sup>, nursing homes<sup>10</sup>, cinemas<sup>11</sup>, and caravan sites<sup>12</sup> may be reviewed by the sheriff sitting in either a judicial or a governmental capacity. As in the past, sheriffs also have powers to hear appeals in areas such as housing and buildings<sup>13</sup>, public health<sup>14</sup>, roads and bridges<sup>15</sup>, electoral law<sup>16</sup>, social work<sup>17</sup>, and education<sup>18</sup>.

The context in which the sheriffs' powers are discussed has also changed. The dispute between deutes and substitutes over status was finally brought to an end by the creation of a new career structure. As a result of the Sheriff Courts (Scotland) Act 1971, the part-time deutes were replaced by full time sheriffs principal, and substitutes were at last renamed "sheriffs".<sup>19</sup> The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 introduced, however belatedly, a judicial career system, which provides for the promotion of distinguished sheriffs to the Court of Session bench.<sup>20</sup> Accordingly, there is now little cause for the duties within local administration to be cited in petty squabbles between sheriffs over remuneration and status.

However, the recent development in the law and practice of judicial review of administrative action has stimulated more general interest in the sheriffs' powers. Indeed, the case which entrenched common law judicial review as a privative jurisdiction of the Court of Session, and led to the implementation of the new accelerated procedure for judicial review under Act of Sederunt, concerned the question of whether the sheriff court had a common law jurisdiction to review local

authority decisions.<sup>21</sup>

Fresh consideration of the role of the legislature, the courts, tribunals, ombudsmen and decision taking by administrators eventually led to academic discussion of the sheriffs' powers. A number were discussed in isolation. However, Himsworth was the first academic to examine in any detail the provisions dealing with local administration, and to present them as a collective jurisdiction. In a series of published and unpublished papers<sup>22</sup>, he set out an extensive list of provisions which allow appeal to the sheriff from local authority decisions<sup>23</sup>, established a typology of powers<sup>24</sup>, and questioned the continued relevance of sheriffs exercising "administrative" powers.<sup>25</sup>

Himsworth concentrated his attention on the sheriffs' appellate jurisdiction to review the decisions of public authorities. He noted that the legislature has created new styles of appeal involving the sheriff.<sup>26</sup> These appeals have not replaced existing powers but operate alongside them. The result of this is, if anything, rather more confusion than before, but an interesting picture does emerge. It should become clear that in the creation of new styles of appeal Parliament has on the one hand illustrated the problems inherent in involving a judicial officer and the adjudicatory process in local administration more clearly than before, whilst on the other it has given some idea of how sheriffs could be called upon to serve as a useful complement to the common law review function of the Court of Session.

In recent years the legislature has introduced a number of powers which have sought to limit the sheriffs' powers of review. Himsworth has sub-divided these provisions into two broad categories of "restricted powers of review"<sup>27</sup>: first,

powers in which the competency or success of any review is dependent on the existence of specified facts or statutory criteria<sup>28</sup>; and second, powers in which the sheriffs' jurisdiction is focused on "legal" and jurisdictional questions.<sup>29</sup> In the first category, the legislature has perpetuated the tradition established in earlier governmental legislation. Although the sheriff's powers of review are limited, they are not limited in such a way as to exclude sheriffs from intervening directly in the policy or merits considerations of decisions taken by elected authorities.<sup>30</sup> Indeed, as will be made clear below, the legislation can effectively require them to do so. Some examples of this type of legislation may be viewed as encouraging the breach of ostensive judicial impartiality and competence, and may therefore be criticised in the context of the rule of law theory and general principles adopted in part one.<sup>31</sup> In contrast, the second category, by focusing attention on legal and jurisdictional concerns<sup>32</sup>, may be viewed as providing for a review function which is in accordance with the standards of secondary morality.

Indeed, Himsworth has argued that the legislature, by continuing to create what he terms "appeals to the sheriff on the merits of local authority decisions"<sup>33</sup>, is perpetuating an "area of decision-taking"<sup>34</sup> which is "anomalous in terms of the principles of democracy, legitimacy and efficiency which may be supposed to inform the system as a whole".<sup>35</sup> Certain powers should therefore be seen as lacking constitutional "justification"<sup>36</sup>. Assuming this category of powers to be the rough equivalent of governmental powers, it is argued that Himsworth is correct to take such a strong stand. Similarly, his assertion that; "[I]f new general rights of appeal were to be granted or if existing ones came under increasing use by the consumers of

local authority services, then the resulting pressure from contentious business could impose uncontainable stress on the legitimacy of the office of sheriff..."<sup>37</sup>, is also supported. The general issue of the suitability of the sheriff continuing to exercise governmental powers is considered in depth in chapters eleven and twelve.

## **Section Two: Case Law Developments Since 1970**

The difficulties inherent in the exercise of governmental powers were anticipated by Sheriff Macphail in Carvana v. Glasgow Corporation.<sup>38</sup> The case concerned a governmental style of appeal made to the sheriff following the refusal by a local authority to renew a street trader's licence.<sup>39</sup> In the course of his judgement, Sheriff Macphail produced a sophisticated blend of argument which went some way towards reconciling the conflicting views of Lords President Cooper and Clyde, which were noted in chapter seven. Whilst quoting with approval from Lord Cooper's statement of the distinctions between "judicial" and "administrative" powers<sup>40</sup>, he nonetheless endorsed and gave weight to Lord Low's view as expressed in Allen that sheriffs should limit their discretion when taking "administrative" decisions.<sup>41</sup> Rather disingenuously, Sheriff Macphail stated that while he agreed with the opinion of Sheriff Black in the General Billposting case ("I reject altogether the respondents' contention that I have no power to review their decision on the merits..."), and that there was an "unrestricted right of appeal to the sheriff", he nonetheless felt that when acting "administratively", "...the sheriff should not, ..., vary or reverse the decision of the magistrates' committee unless he is satisfied that their decision is wrong, and ... he should pay due attention to the competence of the magistrates in

arriving at their opinion."<sup>42</sup> Put simply, Sheriff Macphail argued that sheriffs should restrict their "administrative" discretion according to a test which is not dissimilar in its essentials to those suggested in Allen and Kaye v. Hunter<sup>43</sup>, although he managed to do so whilst showing every respect to the Glasgow Churches decision.<sup>44</sup> His judgement has been followed in a number of subsequent cases, and it is not difficult to see why: it offers a relatively smooth passage out of choppy water.

However, two points should be appreciated. First, although the test of wrongness and competence is a limitation of shrieval discretion which is not as offensive to general principles and wider rule of law theory than a strong exercise of discretion, it is a very much less exacting limitation than that which was set out in Allen.<sup>45</sup> It still involves the potential for a direct review of policy and merits which could be viewed as being contrary to ostensive judicial impartiality or competence. Second, it should not be forgotten that the interpretation of a limited role is contrary to the extent of ex facie discretionary power held in the majority of provisions involving the sheriff in local administration. This should become clear in chapter nine.<sup>46</sup> Given that Sheriff Macphail's decision is only persuasive rather than binding<sup>47</sup>, it is always possible that a different interpretation of the sheriffs' powers could be followed in a subsequent case: for example, Carvana was ignored in Hamilton v. Chief Constable of Strathclyde.<sup>48</sup> In any case, as is noted below, a recent judgement of the Court of Session may also discourage sheriffs from taking Sheriff Macphail's approach.<sup>49</sup> Himsworth recognised the potential for this sort of conflict when he commented that a "... "benevolent" approach [ie of the sort taken by Sheriff Macphail] cannot be guaranteed and even where the primary statutory function



of the local authority is acknowledged, the sheriff himself remains the judge of whether his views should prevail...".<sup>50</sup> Accordingly, the potential for confusion remains.

The extent of shrieval discretion has not been the only difficulty which the court has had to deal with. As before, the inter-related difficulty of distinguishing between "administrative" (ie governmental) and "judicial" roles has also caused problems for sheriffs.

For example, debate arose as a result of the "considerable degree of uncertainty"<sup>51</sup> created by Hamilton v. Chief Constable of Strathclyde<sup>52</sup>, which concerned an appeal to the sheriff from the decision of a chief constable made under the Firearms Act 1968. On this occasion the sheriff chose to distinguish - on the basis of a procedural technicality - Lord President Clyde's judgement in Kaye v. Hunter that in firearms cases the sheriffs' powers were "administrative".<sup>53</sup> He placed great emphasis on Lord President Cooper's remarks regarding the distinction of functions as set out in Arcari.<sup>54</sup> However, he did not appear to consider the central question of whether or not a "true lis" existed. The sheriff held, contrary to Kaye v. Hunter, that his powers were "judicial", although it should be noted that the grounds for his distinction were far from firm, and that it was by no means certain that an appeal to the Court of Session was competent.<sup>55</sup>

It is argued that although the outcome of the case may be correct (ie that the sheriff's function is judicial)<sup>56</sup>, the sheriff's approach was flawed, and deserves criticism. He was selective in his adoption of the tests for distinguishing functions as set out by the Court of Session in Arcari and Kaye v. Hunter: by failing to give



consideration to the question of whether or not a "true lis" existed, he failed to apply precedent satisfactorily.<sup>57</sup> Other weaknesses in the decision become apparent, although these arise more from the conflicting authorities emanating from the Court of Session, rather than from shrieval error. They provide further illustration of the difficulties the Court of Session has created by failing to provide a clearer indication of how sheriffs should interpret the nature and extent of their discretion, and give weight to the view that the distinction between "judicial" and "administrative" powers has become tautologous as a result of the court's inability to rule authoritatively on whether an "administrative" decision implies a limited review of capricious or arbitrary conduct, or a wider discretionary power.<sup>58</sup>

The sheriff implicitly took the view that when sheriffs act "judicially" they have a wider discretion to consider and overturn the merits of a local authority's decision than when acting "administratively", even though they are fettered by the possibility of an appeal to the Court of Session.<sup>59</sup> Their "periphery of concern"<sup>60</sup>, although placing emphasis on questions of law and potentially subject to appeal, is wider: in effect, sheriffs are to take the decision de novo, and are not limited to questions of vires or "capricious and arbitrary" action.<sup>61</sup> However, the potential for confusion arises once it is appreciated that this state of affairs only exists if Lord President Clyde's restrictive interpretation of "administrative" power<sup>62</sup> has been accepted. If Lord President Cooper's wider formulation of "administrative" discretion is adopted, then presumably the sheriffs' power of decision under it is wider than any "judicial" power.<sup>63</sup> The tables are effectively turned: there is no possibility of appeal to the Court of Session and no limit on the sheriffs' grounds of review. Under

Lord Clyde's interpretation, both types of discretion are limited, but the "judicial" category probably less so, whereas Lord Cooper's judgements would lend support to the argument that it is the "administrative" category which offers sheriffs most discretion.

The questions of the extent of shrieval discretion and distinctions between decision taking functions have both been considered recently in a highly authoritative decision of the Second Division of the Court of Session. In the 1992 case of Rodenhurst v. Chief Constable, Grampian Police<sup>64</sup>, a court of five judges overruled Kaye v. Hunter. The case concerned the question of whether an appeal to the sheriff over a firearms certificate was an administrative or judicial provision<sup>65</sup>: if Lord Clyde's decision in Kaye was correct, then it would have been viewed as being administrative, and there could be no further appeal from the sheriff's decision. The court held that the sheriff's power was judicial and that appeal was therefore competent.<sup>66</sup>

Significantly, the court distinguished Lord Low's test that a decision must be "capricious and arbitrary" before a sheriff can contemplate review when acting in an administrative capacity. This was because the provision in the Allen case stipulated a reasonableness test, whereas none was set out in the equivalent provision in Kaye.<sup>67</sup> The decision in Rodenhurst therefore moves the court towards the position adopted by Lord President Cooper<sup>68</sup>, and may encourage a more literal interpretation of instant statutory provisions. The wider result of this distinction in cases where there is a general power of review may be that sheriffs could feel less inclined to adopt "benevolent" interpretations of the sort set out by Sheriff Macphail<sup>69</sup>, and

more willing to make evaluations of merits and policy. In terms of the general principles and rule of law theory adopted earlier, this aspect of Rodenhurst is therefore potentially rather negative, as shrieval activism in governmental areas must inevitably lead to concern for ostensive judicial impartiality and competence. However, the court's reasoning is rather convoluted, and it is likely that the court has perpetuated confusion, rather than dispelled it. It remains to be seen how matters will develop.

The decision does, however, correct one of the major flaws in Kaye v. Hunter in that proper consideration is given to the question of whether an appeal provision is "in a real sense a true lis".<sup>70</sup> Unfortunately, the court did not provide a particularly sophisticated or enlightened explanation of what a "true lis" is, beyond stating that "... in our view there was a true lis; as the pleas in law show, there were questions of law which arose between the parties and upon which the sheriff had to pronounce a judgement between them.... the appeal fell to be disposed of as a summary application, ... and the sheriff was required to give a judgement in writing."<sup>71</sup>

The court's approach to distinguishing functions may therefore be viewed as being highly proceduralistic: there is no direct consideration of theoretical aspects. Lord Cooper's test has simply been re-stated.<sup>72</sup> A rather more theoretically based argument on what a "true lis" may or may not be is set out in chapter nine below.

### **Summary and Conclusion**

The significance of the sheriff's powers in local administration continued to

decline, although sheriffs also continued to hold a number of weighty powers as both judicial and governmental decision takers in Scottish local administration. The difficult and anomalous nature of much of the sheriff's powers, together with their ad hoc, inconsistent range, was, for the first time, subjected to detailed academic study by Himsworth.

The case law confusions noted in preceding chapters continued, despite Sheriff Macphail's efforts in Carvana to reconcile the conflicting interpretations of the nature and range of the sheriff's "administrative" discretion. The recent Court of Session decision in Rodenhurst, despite the fact that it was produced by a court of five judges, is not necessarily conclusive. Although great stress is put on Lord President Cooper's test for distinguishing between administrative and judicial decisions, it is not expanded in any detail. Whilst it may seem that Lord Cooper's wider interpretation of the sheriff's "administrative" function is favoured by the court, the decision is nonetheless rather vague, and it is difficult to predict whether it will affect the attempts of Sheriff Macphail and others to limit their discretion.

## **Chapter Nine: An Analytical Framework of the Sheriff's Jurisdiction in Local Administration**

### **Introduction**

This chapter sets out an analytical framework of categories to which the sheriff's powers in local administration can be allocated. The nature of the categories is derived from the rule of law theory and general principles set out in part one of the thesis, and the historical material in part two. The aim of the exercise is to clarify the nature of the sheriff's functions. Delineating functions facilitates research into the different styles of provision which exist, and enables concentrated and effective consideration of whether certain duties are now anachronistic or anomalous.

It should be noted that the classification is not exhaustive: for example, the sheriff's duties in arbitration<sup>1</sup> and compulsory purchase<sup>2</sup> have been excluded from the study, as have ex officio ceremonial duties.<sup>3</sup> The focus is on powers which involve sheriffs in local government decision taking.

The categories are not intended to be rigid demarcations, and it should be recognised that in some cases allocation may be a matter for conjecture. It can be argued that the allocation of functions is a barren and fruitless exercise.<sup>4</sup> However, it is contended that this is not necessarily so. It is inevitable that making distinctions may involve difficult questions of degree. This should not be viewed as being an altogether negative aspect of the process. It would indeed be pointless to become too involved in close argument over individual questions of allocation as there will always be scope for disagreement. However, it would be a mistake to forget the broader point that engaging in this type of exercise futhers the debate over the function of the court and the role of adjudication.

The analytical framework of the sheriff's jurisdiction is made up of four categories: the chapter is therefore sub-divided into four sections, with a brief conclusion. It is not intended to look at the nature of the categories or individual provisions in any great detail in this chapter: in depth consideration and empirical testing of the categories and constituent powers is set out in part four of the thesis.<sup>5</sup> The four categories are the sheriff as:

1. a "first instance executive authority";
2. a "higher governmental authority";
3. a "civil judge"; and
4. an "administrative judge".

Nearly all provisions are brought before the sheriff by means of summary applications procedure<sup>6</sup>, although it should be noted that applications for the Sheriff Principal to perform some ex officio executive duties are not.<sup>7</sup>

### **Section One: The Sheriff as a First Instance Executive Authority**

This area of shrieval activity may be seen as the derivative of the sheriff's eighteenth and nineteenth century role as the Crown's "representative and executive officer for civil affairs"<sup>8</sup>, acting on behalf of central government in the absence of effective or elected public authorities.<sup>9</sup>

As was mentioned in the preceding chapter<sup>10</sup>, sheriffs are no longer empowered to supervise and control large scale administrative undertakings (such as elections), although there are a number of provisions under which sheriffs conduct public local inquiries. Sheriffs Principal continue to hold a number of comparatively

minor ex officio duties.<sup>11</sup> The remaining powers can be grouped under five general subject headings: animal welfare, harbour legislation, licensing, public police and health, and rights of the subject. Although the focus of most of these provisions is on questions of individual rights, it would seem that, because of their historic "ministerial" involvement in these and similar areas, and the fact that they are not called upon to decide questions of law, sheriffs continue to construe powers in this category as being separate from "judicial" business.<sup>12</sup> What then are the main features of its constituent powers?

In effect, the sheriff's role is that of a first instance executive official acting on behalf of Parliament. He is not empowered to review the decisions of an administrative body, such as a local authority: instead, the responsibility for decision taking comes directly to the sheriff after application by statutorily empowered individuals. For all practical purposes, the sheriff is therefore the statutory decision-taking authority and his powers of decision are final<sup>13</sup> (although subject to judicial review).<sup>14</sup> It is also in the nature of this category that the sheriff is given a wide statutory discretion: he is not limited to considering questions of vires or jurisdiction.<sup>15</sup> Whilst some of the powers, for example the licensing of private clubs<sup>16</sup>, involve little more than "rubber stamping" and are largely dealt with by Sheriff Clerks<sup>17</sup>, others involve difficult hearings and require a considerable degree of ability and experience for their successful execution.<sup>18</sup>

The powers which go together to make up the "first instance executive" jurisdiction of the modern sheriff are set out below, together with a brief indication of their general nature.

**(a) Ex officio governmental powers and public local inquiries**

**Education (Scotland) Act 1980** (c44) s100 Sched 2 para 4.

(Sheriff Principal to act as Chairman of Independent Schools Tribunal.)

**Local Government (Scotland) Act 1975** (c30) s4(2), (10).

(Sheriff Principal to appoint members of local valuation appeals tribunals.)

**Mental Health (Scotland) Act 1984** (c36) s.123.

(Sheriff to conduct public local inquiries under the Act.)

**Merchant Shipping Act 1894** (57&58 Vict)(c60) s668(1) as substituted by Sheriff

Court Reorganisation Order 1974 (SI No 2087) Art 6(1) Sched 2.

(Sheriff Principals to serve as Commissioners for Northern Lighthouses.)

**(b) Animal Welfare**

**Performing Animals (Regulation) Act 1925** (15&16 Geo 5)(c38) s6.

(Sheriff to make orders concerning cruelty to performing animals.)

**Protection of Animals (Scotland) Act 1912** (2&3 Geo5) (c14) ss 2,3.

(Sheriff has power to make orders for destruction of maltreated animals.)

**(c) Harbour and Dock Legislation**

**General Pier and Harbour Act 1861** (24&25 Vict) (c45) s15 (as amended by Sheriff

Court (Scotland) Act 1971 (c58) s4 Sched 1 para 1.

(Sheriff has power to approve bye-laws for harbours and piers.)



**Harbour Docks and Piers Clauses Act 1847** (10&11 Vict) (c27) (as amended by the Sheriff Court (Scotland) Act 1971 s4 Sched 1 para 1) ss 7,26,79,80,85.

(Sheriff has power to certify harbours, approve harbour bye-laws, make provision for harbour policing etc.)

#### **(d) Licensing**

**Gaming Act 1968** (c65) Sched 4 para 1(1); Sched 8 paras 1,8,9,10,18.

(Sheriff responsible for the registration of gaming in clubs and miners' welfare institutions.)

**Licensing (Scotland) Act 1976** (c66) ss, 104,105,108 [as amended by Law Reform (Miscellaneous Provisions)(S) Act 1990 (c.40), Sched.8],109 [as amended ibid],110.

(Sheriff responsible for the licensing of private clubs.)

#### **(e) Police and Public Health**

**Burial Grounds (Scotland) Act 1855** (18 and 19 Vict)(c68) s4 [as amended by Local Government (Scotland) Act 1895 (58&59) (Vict c52) ss21,22; Public Health (Scotland) Act 1897 (60&61 Vict)(c.38) s.146(2); Local Government (Scotland) 1929 (19&20 Geo5 c25) s1(1),2(1)(e); Local Government (Scotland) Act 1973 s169(1); SI 1952 No1334]; s10; s18 [as amended by Burial Grounds (Scotland) Amendment Act 1886 (49&50 Vict) (c21); applied by the Church of Scotland (Property and Endowments) Act 1925 (15&16 Geo 5) (c33) s32]; s32.

(Sheriff has powers to hold inquiries into closure of burial grounds, to allocate new

grounds, and decide on questions relating to the sale of burial grounds.)

**Firearms Act 1968** (c27) ss21(6), 52(4).

(Sheriff has power to allow convicted person possession of firearms, and to order destruction or disposal of firearms.)

**Food Safety Act 1990** (c16), s.37.

(Sheriff has power to order closure of premises.)

**Local Government (Omnibus Shelters and Queue Barriers) (Scotland) Act 1958**

(6&7 Eliz 2) (c50) s6 [as amended by the Roads (Scotland) Act 1984 (c54) s49 Sched 9 para 48].

(Sheriff has power to deal with any question with respect to provision of bus shelters.)

**Local Government (Scotland) Act 1973** (c65) s75(2); ss231, 232.

(Sheriff has power to order disposal of public land, and give directions on general points of difficulty arising under the Act.)

**Public Health (Scotland) Act 1897** (60&61 Vict)(c38) ss154, 157 [repealed in part by Local Government (S) Act 1973, Sched 27],16(9),(10),(11); s22 [as amended by the Control of Pollution Act 1974 (c40) Sched 2 para 1; repealed in part by Clean Air Act 1956 (c52) Sched 4; Local Government (Scotland) Act 1973 Sched 27]; s23 [repealed in part by 1973 Act ibid]; s25; s26; s32(1) [as amended by Criminal

Procedure (Scotland) Act 1975 (c21) ss289F, 289G, inserted by Criminal Justice Act 1982 (c48) s54]; s32(4); s36(1) [as amended by the National Health Service (Scotland) Act 1972 (c58) sched 6 para 44; 1973 Act ibid; 1975 Act ibid; repealed in part by Local Government (Miscellaneous Provisions) (Scotland) Act 1981 (c23) Sched 4]; s36(2)]; s41 [as amended by Radioactive Substances Act 1960 (c34) s9 Sched 1 Part II para 13]; s47(4) [as amended by 1972 Act ibid Sched 6 para 45 and 1973 Act ibid]; s76; s90 [as amended by 1973 Act ibid].

(Sheriff has wide and general powers to make orders after application by local authority concerning nuisances, pollution and public health.)

#### **(f) Rights of the Subject**

**Church of Scotland Act 1863 (27&27 Vict)(c47) s2** [as amended].

(Sheriff has power to certify that parish minister is suffering from mental disorder.)

**Mental Health (Scotland) Act 1984 (c36) s18; s56(1).**

(Sheriff has power to order compulsory hospitalisation of mentally ill and appoint acting nearest relative.)

**National Assistance Act 1948 (11&12 Geo6) (c29) s47** [as amended by National Assistance (Amendment) Act 1951 (c57) s1(2); Local Government (S) Act 1973 Sched 27, para 94; and National Health Service (S) Act 1972 (c58) Sched 6, para 83]; s65 [as amended and repealed in part by National Health Service and Community

Care Act 1990 (c19) Sched 9]

(Sheriff has power to order compulsory care for chronically sick, aged, infirm or incapacitated.)

**Health Services and Public Health Act 1968** (c46) s72(1) [as amended by National Health Service (Scotland) Act 1972 (c58) Sched 6 para 139]; s72(2) [as amended by 1972 Act ibid, para 138].

(Sheriff has power to order medical inspections of persons who may be suffering from an infectious disease.)

**Public Health (Scotland) Act 1897** (60&61 Vict) (c38) s54(1) [as amended and repealed in part by the National Health (Scotland) Acts 1947 (c27) Sched 11 PtI and 1972 (c58) Sched 6 para 50, Local Government (Scotland) Act 1973 (c65) Sched 27., and National Health Service and Community Care Act 1990 (c19), Sched 9]; s52(3) [inserted by 1947 Act ibid and repealed in part by 1973 Act ibid]; s55(1) [inserted and repealed in part ibid]; s55(3) [inserted and repealed in part ibid]; s69(1) [as amended by 1972 Act (c58) ibid Sched 6 para 55 and repealed in part by National Assistance Act 1948 (c29) Sched 7, PartIII; and 1973 Act ibid].

(Sheriff has power to make orders relating to provision of care and burial of persons suffering from infectious disease.)

## **Section Two: The Sheriff as a "Higher Governmental Authority "**

This category of powers is the largest in the analytical framework. Most of

the provisions are derived from the governmental tradition established in the police and local government improvement legislation of the nineteenth century<sup>19</sup>, although there are new styles of appeal which were created after the Grant Committee's recommendations.<sup>20</sup> The category is effectively made up of those appeals which the court has viewed, or would be likely to view, as being "administrative"<sup>21</sup> functions. Once more, the statutory powers held by the sheriff cover a wide range of subject-matter.

The sheriff's statutory role in this area is that of an appellate body, retaking decisions (usually *de novo*<sup>22</sup>) made by a public authority (typically an elected local authority), following an appeal by a statutorily empowered individual. The decision is final.<sup>23</sup> The review is wider than simply jurisdictional or "legal" concerns.<sup>24</sup> It is important to note that a literal interpretation of the provisions in question can put the sheriff in the position where he must evaluate the merits and policy aspects of an authority's decision.<sup>25</sup> Crucially, the powers in this category involve strongly polycentric issues and what has been termed "direct political involvement"<sup>26</sup> - that is, the general subject matter of the appeals can be seen as requiring sheriffs to make a direct evaluation of the policy merits of decisions reached by elected politicians (or their officials) in areas which are highly influenced by political considerations.

This is what distinguishes "higher governmental" powers from those in the "administrative judge" and "civil judge" categories set out below. When creating powers which might be described as being those of an "administrative judge", the legislature expressly limits the sheriff to issues which are not dissimilar to those considered in a common law judicial review: the delineation is clear enough.<sup>27</sup> In

the "civil judge" category, the distinction is more nebulous, but nonetheless still valid: the legislation focuses the sheriff's attention onto questions of individual rights which have a low political content and an acceptable polycentric effect: there is little risk to the standards of ostensive judicial impartiality and competence.

Lord Cooper's attempt to distinguish judicial from administrative functions by asking whether the statute in question provided for a "true lis"<sup>28</sup> marks the starting point for consideration. What is at the nub of the distinction? What makes a lis a "true lis"? It is contended that there is more to the distinction than was indicated in Arcari and Rodenhurst: theoretical issues are also raised.

It must be recognised from the outset that all of the sheriff's appellate governmental and judicial powers involve (in varying degrees):

- (i) the potential for "direct political involvement" and polycentric effect; and
- (ii) direct implications for the rights of individual appellants, whose circumstances may be seriously affected by the decisions taken.

It is contended that when (i) predominates, the provision can be identified as "governmental": correspondingly, when (ii) predominates, the appeal may be termed "a true lis", suitable for adjudication, and the sheriff's power may be characterised as being "judicial". The difficulty arises in evaluating whether the provision is focused on (i) or (ii). To some extent, this is always going to involve subjective choice, and there will inevitably be disagreement over allocation. However, what is suggested here is a test for reaching decision, which is based on the general principles and rule of law theory advanced in part one. It is not being claimed that the test does anything more than provide a rough idea of how to make general

distinctions between the differing natures of the sheriff's powers. As indicated in the introductory section, the value of the process is that it encourages consideration of distinctions between decision taking functions, rather than the provision of definite and precise classifications.

Two basic rules can be formulated in a simple protasis/apodosis<sup>29</sup> style. First, if a literal interpretation of the provision in question suggests that:

(i) the sheriff is required to conduct a direct review of the policy and merits aspects of an elected authority's decision in an area which has a high political content (ie the nature of the provision is such that there is the potential for the ostensive impartiality of the sheriff to be tarnished because of "direct political involvement"<sup>30</sup>); and

(ii) shrieval adjudication has been allocated in an area with the potential for a strong polycentric effect (ie there is a significant likelihood that the standard of ostensive judicial competence may be breached)<sup>31</sup>;

then it may be argued that the sheriff is exercising a power which can be described as "governmental".

Conversely, if a literal interpretation of the statute indicates:

(i) that there are no strong and direct political concerns involved in the sheriff reviewing the merits and policy aspects of an authority's decision (ie the sheriff's ostensive impartiality is not threatened); and

(ii) that shrieval adjudication is not operating in an area in which polycentric considerations are likely to predominate (ie the legislation is focused on the question of individual rights and shrieval adjudication is therefore ostensibly competent as a

decision taking process);

then it may be argued that the sheriff is exercising a power which may be described as being that of a "civil judge".

There are other inter-related factors derived from precedent which may be used to supplement the classification process. Accordingly, if the sheriff's powers are final and not subject to appeal to the Court of Session because they extend a pre-existing jurisdiction, this may suggest that they are administrative (ie governmental) rather than judicial.<sup>32</sup> Similarly, if the sheriff is not required to consider questions of law, his function may be viewed as being governmental.<sup>33</sup> If the proceedings "do not originate (as in the ordinary "action" or "cause") in a formal demand by a litigant for a remedy from the sheriff court, but in a notice embodying a decision by the local authority, and, when the sheriff first appears, he is exercising what is in substance an appellate and not an original jurisdiction", it may be argued that the decision should be viewed as being governmental.<sup>34</sup> Whether or not the sheriff has the power to award expenses may also be viewed as providing a clue as to the nature of the provision: if the sheriff has a special power to award expenses, then there may be an assumption that the jurisdiction is governmental.<sup>35</sup> If a provision is made for appeal to "the sheriff", rather than "the sheriff court", a governmental jurisdiction may be implied.<sup>36</sup> However, it is important to appreciate that in the context of the protasis/apodosis tests adopted in this thesis, these points are secondary to the rather more difficult and nebulous task of conducting an evaluation of the degree of "direct political" and polycentric effect, and the risks to ostensive judicial impartiality and competence.



The protatsis/apodosis tests have been used to identify the statutory provisions which make up the sheriff's jurisdiction as an "higher governmental authority". The list provided below is not exhaustive, and it should not by any means be viewed as being conclusive, but it is hoped that most powers have been identified. As in section one, the powers have been set out under general subject headings, and a brief note indicates the nature of the sheriff's functions.

### **Building/Planning/Roads and Bridges**

**Building (Scotland) Act 1959** (7 and 8 Eliz 2) (c24), s.16 [as amended by Building (Scotland) Act 1970 (c38), Sched. 1, Pt. I, para. 5(a); Local Government (Scotland) Act 1973, Sched. 15, para. 1]; s.6B [as inserted by s.4 1970 Act ibid].

(Sheriff has power to hear appeals concerning a wide range of local authority building orders.)

**Housing (Scotland) Act 1987** (c26), ss. 111, 112, 129, 163, 186.

(Sheriff has power to hear appeals concerning a wide range of local authority building orders.)

**Sewerage (Scotland) Act 1968** (c47) s.3(2) [as amended by Roads (Scotland) Act 1984 (c54) Sched. 9 para. 64(2)]; s.14(5); s.21(2) s.15(2).

(Sheriff has power to hear appeals against local authority sewer proposals and orders.)

**Roads (Scotland) Act 1984** (c54) ss.1(5)(7), 151(1); s.13(7) [amended by 1989 (c40)

Sched 18]; s.57(6); s.63(3); s.74(4); s.90(4); s.91; s.93; s.99(4).

(Sheriff has power to hear appeals concerning a wide variety of roads authority decisions.)

### **Education**

**Education (Scotland) Act 1980**, (c44); s.28F(2)(3)(4)(8)(9) [inserted by Education (S) Act 1981, s.1]; s.38 [as amended by Education (Scotland) Act 1981 (c58) Sched. 2 Pt II para. 5 Sched. 8]; s.65(1),(2).

(Sheriff has power to hear appeals from education authority decisions on school placing, school attendance orders, and those concerning children with special needs.)

### **Licensing**

The provisions in this sub-category provide for appeals from local authority licensing and registration decisions. The subject matter of appeals is not particularly noteworthy: the important point is that a literal interpretation of the provisions provide for a wide shrieval discretion to review policy and merits.

**Animal Boarding Establishments Act 1963** (c43) s.1(9).

**Breeding of Dogs Act 1973** (c60) s.1(10).

**Betting, Gaming and Lotteries Act 1963** (c2) Sched. 1 para. 28(1); Sched. 2 para. 7 [as amended by Local Government (Scotland) Act 1973, Sched. 24 para. 26].

**Caravan Sites and Control of Development Act 1960** (8 and 9 Eliz 2) (c62) ss.7(1), 32(1).

**Celluloid and Cinematograph Film Act 1922** (12 and 13 Geo 5) (c35) ss.1(3), 10.

**Cinemas Act 1985** (c13) s.16(1).

**Control of Food Premises (Scotland) Act 1977** (c27) s.3(3).

**Dangerous Wild Animals Act 1976** (c38) s.2(8)

**Fire Precautions Act 1971** (c40) ss.4(1), 43(1), 9(2).

**Food Safety Act 1990** (c16), ss.26(2)(e), 37.

**Guard Dogs Act 1975** (c50) ss.3(1), 4(1) [applied by Animals (S) Act 1987 (c9), s.2(2)].

**Lotteries and Amusements Act 1976** (c32) Sched. 1 para. 6.

**Nurseries and Childminders Regulation Act 1948** (11 and 12 Geo 6) (c53) ss.6(4), 2.

**Nurses (Scotland) Act 1951** (14 & 15 Geo 6) (c55) s.28(4).

**Nursing Homes Registration (Scotland) Act 1938** (1 and 2 Geo 6) (c73) s.3(3).

**Pet Animals Act 1951** (14 and 15 Geo 6) (c35) s.1(8), (4).

**Poisons Act 1972** (c66) s.5(4),(6)(a).

**Riding Establishments Act 1964** (c70) s.1(5)(10) [as amended by Riding Establishments Act 1970 (c32) s.2(2)].

**Road Traffic Act 1972** (c10) s.90(1)(a); s.90(1)(b) [as amended by Road Traffic Act 1974 (c50) Sched. 3 para. 6; Transport Act 1981 (c56) Sched. 12 pt. III]; s.90(1)(c); s.90; s.118(1)(2).

(Sheriff hears appeal from Secretary of State.)

**Slaughter of Animals (Scotland) Act 1980** (c13) ss.5(5); 15(4) [as amended by Animal Health Act 1981 (c22), Sched. 5].

**Social Work (Scotland) Act 1968** (c49) Sched. 5 para. 1.

**Safety of Sports Grounds Act 1975** (c52) s.7 [amended and repealed in part SI 87/1689].

**Theatres Act 1968** (c54) s.14(1).

**Zoo Licensing Act 1981** (c37) ss.18(1)(b).

### **Local Government/Public Health**

**Civic Government (Scotland) Act 1982** (c45) s.106(1) s.119(9).

(Sheriff hears appeals from local authority decisions regarding charitable collections.)

**Clean Air Act 1956** (4 & 5 Eliz 2) (c52) s.12(3) [as amended by Interpretation Act 1978 (c30) s.17(2)(a)].

(Sheriff hears appeals from local authority decisions on smoke control.)

**Local Government (Scotland) Act 1966** (c51) Sched. 3 para. 3(4).

(Sheriff hears appeal from the decisions of local authorities on building completion orders.)

**Prevention of Damage by Pests Act 1949** (12, 13 and 14 Geo 5) (c55) s.4(1),(5),(6).

(Sheriff hears appeals from decisions of local authorities on pest control.)

### **Mental Health**

**Mental Health (Scotland) Act 1984** (c36) s.33(2)(4) [as amended 1991 (c47), s.3]; s.34(1); s.29(4); s.47; s.51.

(Sheriff hears appeals concerning compulsory hospitalisation in State Mental Hospital,

guardianship and discharge orders.)

### **Section Three: The Sheriff as a "Civil Judge"**

Using the protasis/apodosis distinctions set out in section two above<sup>37</sup>, it is possible to identify a number of the sheriff's appellate powers as being those of a "civil judge". These provisions should be viewed as unexceptional civil hearings, in which one of the parties happens to be a local authority: although the sheriff's decision may well have some political content and polycentric effect<sup>38</sup>, the focus of the hearing is on individual rights, and there is little possibility of a breach of ostensive judicial impartiality or competence arising.<sup>39</sup> In general terms, these appeals may be characterised as being analogous to those which the court has held to be "judicial", or a "true lis"<sup>40</sup>: appeal to the Court of Session is therefore competent.

The "civil judicial" powers of the modern sheriff are set out below under general headings, together with a brief note of their subject matter.

#### **Child Law/Social Work**

**Foster Children (Scotland) Act 1984** (c56) ss.9, 10, 11(1).

(Sheriff is empowered to hear appeals from decisions of local authorities on fostering.)

**Legal Aid (Scotland) Act 1986** (c47) s.29(2)(b)(4) [as amended 1990 (c40), sched 8].

(Sheriff is empowered to grant legal aid for referrals under the Social Work (Scotland)

Act 1968 s.42.)

**Social Work (Scotland) Act 1968 (c49)** s.16 [as amended 1976 (c36), Sched 3; 1978 (c28), Sched 3; 1983 (c41), s.7; 1984 (c36) Sched 3; 1985 (c60), s.25; 1986 (c9), Sched 1; repealed in part by 1983 (c41), s.7]; s.18(3) [as amended 1983 (c41) Sched 3; 1978 (c28) Sched 3; 1986 (c9) Sched 1; repealed in part 1975 (c72); 1991 (c50) Sched 1]; s.16A [as inserted by Children Act 1975 (c72) s.75]; s.80.

(Sheriff is empowered to hear appeals from decisions of local authorities on assumption of parental rights, and is able to order payment of contributions to local authorities.)

### **Electoral Law**

**Representation of the People Act 1983 (c2)** ss.56(1),(a),(b),(d); 57; 78; 204; 128(1)(3)(b).

(Sheriff is empowered to hear appeals regarding decisions of the registration officer, election expenses and local authority voting rights.)

### **Miscellaneous**

**Civil Aviation (Air Travel Organisers) Licensing Regulations 1972 CS1 1972 No. 223** Reg 8(2)(a).

(Sheriff hears appeals from decisions of the Civil Aviation Authority.)

**Firearms Act 1968 (c27)** s.44(1).

(Sheriff has power to hear appeals from decisions of Chief Constables to revoke firearms licenses.)

**Fire Certificates (Special Premises) Regulations 1976** S1 1976 No. 2003 Reg. 12(1)(4).

(Sheriff hears appeals from decisions of Health and Safety Executive.)

**Fire Services Act 1947** (10 and 11 Geo 6) (c41) s.26(2)(h) [see Firemen's Pension Scheme Order 1973 SI 1973 No. 966 para. 68(1); SI 89/731; SI 90/1841; and SI 91/1097].

(Sheriff has power to hear appeals under the Firemens' Pension Scheme.)

**Pilotage Act 1983** (c21) s.26(1)(2)(b).

(Sheriff hears appeals from pilotage authority decisions.)

**Tenants' Rights Etc. (Scotland) Act 1980** (c52) s.5(3)(4)(b)(7); s.16(4)(a)(b); s.17(3)(4); s.20(1)(2); s.21, Sched. 3 paras 4, 5; s.23 Sched. 4 paras. 4, 5.

(Sheriff has power to hear appeals regarding statutory rights of local authority housing tenants.)

**Civic Government (Scotland) Act 1982** (c45) s.76; s.6(1).

(Sheriff has power to hear appeals from the decisions of chief constables regarding lost property.)



**Registration of Births, Deaths and Marriages (Scotland) Act 1965** (c.49) s.20(i)(ii)(iii) [as amended by 1986 (c9), Sched 1; 1991 (c50), Sched 1; repealed in part ibid, Sched 2].

(Sheriff has power to hear a variety of appeals from decisions of the Registrar General.)

### **Public Health**

**Sewerage (Scotland) Act 1968** (c47) s.33(2); s.41 [as amended by **Roads (Scotland) Act 1984** (c.54) Sched.9 para.64(4); and 1991 (c.22), Sched. 8].

(Sheriff is empowered to decide disputes between local authorities and statutorily empowered appellants regarding discharge of trade effluents.)

### **Rights of the Subject**

**Race Relations Act 1976** (c.74) s.59(4) [see **Race Relations (Formal Investigations) Regulations 1977** (SI 1977 No. 841) Sched. 1]; ss. 62; 63; 38.

(Sheriff is empowered to hear appeals from Commission for Racial Equality concerning allegations of racial discrimination.)

**Sex Discrimination Act 1975** (c.65) ss.59 [as amended 1984 (c28), Sched 2]; 68; 71; 72 [repealed in part 1976 (c74) Sched 5; amended ibid Sched 4].

(Sheriff is empowered to hear appeals from Equal Opportunities Commission concerning allegations of sex discrimination.)

## **Warrants**

There are a large number of warrants which the sheriff is empowered to grant in order to enable constables or other officials to enforce the provisions of the relevant legislation. For reasons of space, it is not intended to list them.

## **Section Four: The Sheriff as "Administrative Judge"**

As mentioned in chapter eight, the legislature has responded, albeit in an ad hoc fashion, to the recommendations of the Grant Committee and developed statutory formulae which have as their object the exclusion of matters of policy from the sheriff's review of public authority decisions.<sup>41</sup> The legislation requires the sheriff to focus consideration on legal and jurisdictional concerns, and, for the most part is consistent with (although not identical to) the grounds of common law judicial review.<sup>42</sup>

The most important formula is s.39 of the Licensing (Scotland) Act 1976<sup>43</sup>, which stipulates that a sheriff may uphold an appeal from the decision of a licensing board only if he considers that it: (i) erred in law; (ii) based its decision on an incorrect material fact; (iii) acted contrary to natural justice; or (iv) exercised its discretion in an unreasonable manner. Appeal is competent to the Court of Session from the decision of the sheriff on points of law only. The s.39 grounds have been adopted and adapted in a number of other statutes, which, taken together, can be viewed as comprising the fourth category - the sheriff as an administrative judge.

As will be stressed in chapter fourteen below, it should not be claimed that shrieval decisions under provisions of this type do not have policy implications for

authorities: the decision of a court based on "reasonableness" or "error in law" can have some effect on the decision taking authority.<sup>44</sup> What is significant about the adoption of these formulae is that the legislature has shown an implicit sensitivity to the general principles advanced in chapter two. Accordingly, it is possible to discern some form of recognition that it is inappropriate for the sheriff, as an independent judge, to review the policy and merits based decisions of elected local authorities in areas which have a high political content and polycentric effect: the sheriff's political involvement is "indirect", and the polycentric effect of shrieval decisions is within acceptable limits.

The provisions which make up the category are set out below. The vast majority are concerned with licensing and registration.

#### **Appeals in the style of s.39 of the Licensing (Scotland) Act 1976**

**Betting, Gaming and Lotteries Act 1963** (c.2) Sched.1 para.24 [as under Licensing (Scotland) Act 1976 (c.66) s.133(4)].

(Sheriff has power to hear appeals from local authorities on various betting licenses.)

**Civic Government (Scotland) Act 1982** (c.45) s.10(2)(3) [as amended by Transport Act 1985 (c.67) Sched. 7 para 23(5)]; ss. 24(1), 25(3)(6) Sched. 1 para 18(1); s.28(1) Sched. 1 para 18(1); s.38(1) Sched. 1 para 18(1); s.39(1) Sched. 1 para 18(1) [amended by 1990 (c16) Sched 3]; s.40(1) Sched.1 para 18(1); s.41 [as amended by Cinemas Act 1985 (c.13) para 17] Sched. 1 para 18(1); s.43 Sched. 1 para 18(1); s.45 Sched. 2 para 24; s.64.

(Sheriff has power to hear appeals from the decisions of local authorities over various licensing matters and the regulation of public processions.)

**Deer (Scotland) Act 1959** (7 & 8 Eliz 2) (c.40) s.25A(2) [inserted by Deer (Amendment) (Scotland) Act 1982 (c.19) s.11; Licensing of Venison Dealers (Application Procedures)(Scotland) Order 1984 (SI 1984 No.922 Reg.4].

(Sheriff has power to hear appeals from decisions of local authorities on dealers' licenses.)

**Gaming Act 1968** (c.65) Sched. 2 para 33(1); s.52(1); Sched 2 para 61; Sched 2 para 45 [see SI 1978 No.229]; Sched.2 para.47(1) [see SI 1978 No.229]; Sched. 9 para 15 [see SI 1978 No.229 reg 9(1)(b)(c)].

(Sheriff has power to hear appeals from decisions of local authorities on gaming licenses.)

**Licensing (Scotland) Act 1976** (c.66) s.39 [AS (Appeals under the Licensing (Scotland) Act 1976) 1977 (SI 1977 No. 1622); AS (Appeals under the Licensing (Scotland) Act 1976 (Amendment) 1979 (SI 1979 No 1520); as amended 1990 (c40), Sched 8]; ss 17 [amended 1990 (c40) Sched 8]; 26; 31 [amended ibid s.53]; 32; 36; 44; 53 Sched 4 [amended 1990 (c40) s.42; repealed in part ibid, Sched 9] paras 2, 7, 9, 10; s.65 [amended ibid s.48].

(Sheriff has power to hear appeals from the decisions of licensing boards regarding liquor licenses.)

**Lotteries and Amendments Act 1976** (c.32) Sched 3 [amended SI 1988 No 108 and SI 1991/2174] paras 1(1)(d); 1(2)(c); Sched 3 [amended ibid] para 12.

(Sheriff has power to hear appeals from the decisions of local authorities on the commercial provision of amusements with prizes.)

### Conclusion

Provided the process of categorisation remains within sensible boundaries, it is a worthwhile exercise. The four categories noted above should not be viewed as restrictive or rigid. Instead, they provide a framework around which discussion of the different decision taking styles and provisions which make up the sheriff's jurisdiction in local administration can take place. The value and effectiveness of the categorisation, which focuses on theoretical rather than procedural issues, is considered in depth in part four of the thesis.

## **Chapter Ten: The Frequency of Appeals to the Sheriff**

### **Introduction**

It can be appreciated that the sheriff's jurisdiction in local administration is substantial - on paper at least. The 1967 Grant Report suggested (without, however, any empirical justification) that most of the sheriff's powers in this area were seldom exercised, and that they took up no more than 5% of court time.<sup>1</sup> This is what might be termed a "court centred" evaluation, as it makes no comment on the polycentric effect for authorities. It also gives little recognition to the fact that many appeals are of great importance to the individual applicants. Similarly, the high political content and unusual nature of many of the powers is denied any significance.

However, an appreciation of the number of appeals which are made is of obvious relevance in any attempt to build up an accurate picture of how the sheriff's jurisdiction operates in practice. It is difficult to glean anything other than very general information from the Civil Judicial Statistics Scotland<sup>2</sup>, which are compiled by the Scottish Courts Administration.

Accordingly, a fieldwork exercise was carried out in 1987 and 1988, in 12 representative Sheriff Courts situated throughout Scotland (there are 49 courts altogether). The purpose of the exercise was to find out how often individual powers were exercised in these courts over the three year period 1984 to 1986 inclusive. The court records for 1987 and 1988 were not available. The results of the survey enable a qualified extrapolation to be made and it is possible to build up a sufficiently representative picture of what powers are exercised, and how often applications are made.

The chapter is set out as follows. Section one details the research methodology. Section two gives a brief idea of the sheriff clerks' views on the frequency of appeals and the amount of business. Section three provides the main research findings, and a brief conclusion summarises the main points of note.

### **Section One: Research Methodology**

The twelve sheriff courts were selected on the basis of a rural/urban population split which was supplied by the Scottish Office Central Research Unit. The rural/urban split was used to identify three groups of four courts, which provide representative samples of "city" courts, "town" courts and "rural" courts. The sample courts were as follows:

(i)"city" courts: Aberdeen Sheriff Court; Dundee Sheriff Court; Edinburgh Sheriff Court; Glasgow Sheriff Court:

(ii)"town" courts: Dunfermline Sheriff Court; Inverness Sheriff Court; Paisley Sheriff Court; Stirling Sheriff Court:

(iii)"rural" courts: Dunoon Sheriff Court; Duns Sheriff Court; Jedburgh Sheriff Court; and Peterhead Sheriff Court.

Access to court records for the years 1984-1986 inclusive was obtained through the Scottish Law Commission. All the courts were visited in person (the "city" and "town" courts on more than one occasion). The research methodology was comparatively simple. First, sheriff clerks took part in a short, semi-structured interview. Second, the Summary Application books for each year were examined and a note taken of every entry which indicated that an application had been made under

the statutory provisions set out in chapter nine. Care was taken to ensure that any adjournments were accounted for. It should also be noted that some of the provisions listed above were not in force for all or part of the survey period: the preceding provision is recorded when appropriate (e.g. for the Mental Health (Scotland) Act 1984, the comparable provisions of the Mental Health (Scotland) Act 1960 are recorded). Finally, as provisions concerning private landlord and tenant disputes were excluded from the survey, it was decided that appeals under the Tenants Rights (Scotland) Act 1980 should also be omitted. In any case, a similar survey and study of tenants rights appeals was carried out by Himsworth and Adler<sup>3</sup> shortly before the beginning of this exercise. Unfortunately, access to unrecorded decisions was refused. It was not possible to build up a fully representative picture of club licensing: the registers were often not available, as they were either in use or could be required by the court at short notice.

## **Section Two: The Response of Sheriff Clerks**

Short (15 minute) semi-structured interviews were carried out with nine sheriff clerks (referred to as Sheriff Clerks 1 to 9). It was a condition of interview that their comments were given anonymously - although in the event nothing of a controversial nature was said. The sheriff clerks themselves were extremely helpful. Their seniority varied considerably: Sheriff Clerk 1 was Principal Sheriff Clerk for a sheriffdom. Sheriff Clerks 2 and 3 were Assistant Sheriff Clerks in very large urban courts, and the remainder were Sheriff Clerks Depute of varying seniority and experience. The research findings can be summarised as follows.



First, on being given a list of the powers which were under consideration in the survey<sup>4</sup>, the majority of interviewees agreed that most of the provisions were seldom (if ever) the grounds of an application. Second, it became apparent that whilst a small number of powers were exercised fairly frequently, there was a significant variation between courts. For example, those courts which had no mental hospitals within their jurisdiction had little or no experience of applications against compulsory hospitalisation<sup>5</sup>, whereas those which did commented on the relative frequency and sensitivity of these cases. Similarly, Sheriff Clerk 2, who had worked in a number of busy courts, noted that the number of assumption of parental rights cases<sup>6</sup>, though never high, varied according to the policy of different Regional Councils. Sheriff Clerk 1 made a similar comment with regard to appeals against district licensing board decisions.<sup>7</sup> The amount of involvement that sheriff clerks had with applications also varied from power to power, although in the majority of cases the procedure followed was that of a simple summary application. For example, Sheriff Clerks 3 and 5 commented that in compulsory hospitalisation cases<sup>8</sup> their sheriff had instructed them to liaise closely with hospital authorities, whereas the others who had less experience of these cases had not made any particular alterations to their practice. The more senior sheriff clerks (i.e. Sheriff Clerks 1 to 3 and 6) pointed out that any inquiries regarding the registration of private clubs<sup>9</sup> were largely dealt with by sheriff clerks (who are club registrars under the 1976 Licensing Act<sup>10</sup>) rather than sheriffs, although the granting of a licence was always the responsibility of a sheriff. Sheriff Clerk 5 felt that the applications "weren't really court work as such".

Third, sheriff clerks argued that some applications, although made only

infrequently, were time consuming and required complicated administration and planning (the assumption of parental rights<sup>11</sup> was cited by Sheriff Clerk 2 as an example). It was pointed out by Sheriff Clerk 1 that a simple entry in the summary application book gave no real indication of the amount of time and effort that had been expended. Finally, the majority of sheriff clerks were not impressed by the Grant Committee's assertion that "administrative and miscellaneous" business took up around 5% of court time<sup>12</sup>; it was felt that to try and assess an amorphous grouping of statutory applications in this way was largely pointless and potentially misleading. Sheriff Clerk 4 commented that it was an "off the top of the head" assessment, which took no account of local variation and legislative changes.

### **Section Three: Data Collected**

The data collected from summary applications books confirmed the views of the sheriff clerks. It was apparent that there was considerable variation between courts in workload and type of business. For example, Glasgow Sheriff Court had on average four or five volumes of summary applications for each year, whereas the small rural courts might only have two or three pages of summary applications business annually. The difficulties faced by the Scottish Courts Administration when compiling the Civil Judicial Statistics Scotland were also made clear. Sadly, the summary applications books are frequently disorganised and sometimes illegible. Different sheriff clerks have different styles of recording applications: some give a careful note of the statutory provision in question, whereas others merely give the short title of the relevant act.<sup>13</sup> The value of the research findings must therefore be

qualified by this.

The most straightforward way of setting out the data is to list all provisions which were exercised at some time in any of the sample courts. The number of times that they were utilised can then be set out in separate tables under the headings of court and year. For reasons of space and clarity of presentation, it is not proposed to set out the full list of powers included in the survey: reference can be made to the categories set out in chapter nine above. Table One presents the totals from all twelve sheriff courts. Appendix "B" sets out the data for each court.

**GRAND TOTAL FROM ALL TWELVE SHERIFF COURTS**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified	7	3 3	4	3 14
<b>Building (S) Act 1959</b> s 13 s 16	9	4 3	2 3	6 15
<b>Burial Grounds (S) Act 1855</b> s 4	4		2	6
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	44 4 4 77	46 2 5 23	6 1 1 6 11	96 1 7 15 111
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified	12	1	2 4	2 17
<b>Education (S) Act 1980</b> s 28 s 65 unspecified	9 9	12 20	3	24 29
<b>Firearms Act 1968</b> s 26 s 44 unspecified	2 4	1 9	1 7	1 3 20
<b>Fire Precautions Act 1971</b> s 9 s 10	2 4	2		2 6
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified	2	1 1		3 1
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified	1 3 1	2	1 4	2 5 5
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified	3 4	6 3 4	1	9 7 5
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	60 1 1	40 1	30 1	130 3 1
<b>Local Government (S) Act 1973</b> s 231		1		1

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	254	289	543
<b>Mental Health (S) Act 1960</b> Part IV	354	N/A	N/A	354
<b>National Assistance Act 1947</b> unspecified	14	4	3	21
<b>Nursing Homes Registration (S) Act 1938</b> s 3			1	1
<b>Public Health (S) Act 1897</b> s 16	27	38	56	121
s 22				
unspecified nuisance	74	186	238	501
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	164	126	109	399
<b>Road Traffic Act 1972</b> s 90	9	3	2	14
<b>Sewerage (S) Act 1968</b> s 10				
s 46	1		3	4
<b>Social Work (S) Act 1968</b> s 16	9	14	10	33
s 80		2		2
unspecified	36	3		39
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	1102	2395	1187	4384
<b>Rates</b>	107	117	169	393
<b>Value Added Tax</b>	7302	10829	6521	24652

**GRAND TOTAL = 31976**

## Conclusion

Although the grand total of applications is impressive, the vast majority (92%) were applications for warrants. The findings tend to confirm the views of the sheriff clerks: most of the provisions listed in chapter nine are rarely - if ever - used. It is also plain that business is concentrated in the "city" and "town" courts, which is hardly surprising. Indeed, Glasgow accounted for 466 out of the 501 unspecified nuisance applications.<sup>14</sup> Since these courts tend to have "teams" of sheriffs based in them (eg Glasgow has around twenty<sup>15</sup>), the likelihood of these powers coming to the attention of individual sheriffs with any frequency is extremely limited. This no doubt goes some way towards explaining the sheriffs' traditional lack of interest in their jurisdiction in local administration.

However, a few provisions stand out and are of a weighty nature. For example, the period under consideration saw over 500 compulsory hospitalisations under mental health legislation.<sup>16</sup> There was a steady flow of appeals under the Licensing (Scotland) Act 1976<sup>17</sup> and the Civic Government (Scotland) Act 1982<sup>18</sup> which were no doubt of considerable importance to the individual applicants. Over 30 children were the subject of assumption of parental rights proceedings<sup>19</sup>, which, by their very nature, are highly distressing and complicated hearings. Evaluating the effectiveness of sheriff court adjudication as a means of reaching decision in weighty applications of this sort is one of the main aims of part four of the thesis.

As was noted in the introductory section, it is important to look behind the figures. Merely because there are comparatively few appeals, it should not be thought that the provisions themselves are unimportant. For example, there was a

low number of appeals against school placing decisions under the Education (Scotland) Act 1980<sup>20</sup>, but, as will be made clear in chapter twelve, the effect of those decisions on education authorities and their policies was very strong. Accordingly, ascertaining the degree of effect that sheriff court decisions can have on authorities is also an important issue for consideration in part four.

## **Part Four: Introduction**

This part of the thesis has four main aims. First, to give separate and detailed consideration to the different categories of the analytical framework as set out in chapter nine. Second, to evaluate each of the categories using the general principles and rule of law theory developed in part one. Third, to present the result of fieldwork research into powers which (partly on the basis of the data set out in chapter ten) can be viewed as being "representative" of each of the categories: empirical material is used to test the various assertions and points which are made. Fourth, to give consideration to the question of how the sheriff's current jurisdiction could be reformed.

## **Chapter Eleven: An Evaluation of First Instance Executive Powers**

### **Introduction: Aims and Objectives**

The general aim of this chapter is to marry the analytical approach taken in Part One with a fieldwork study of how the sheriff operates in practice. Hopefully, this will result in a synthesis which brings together the most attractive aspects of both traditions of scholarship: the contextual overview and theoretical structure of the former and the detailed, empirically tested consideration of particular judicial functions which is typical of the latter.

The objectives of the chapter can therefore be summarised as follows. First, to discuss how the first instance executive provisions identified in chapter nine correspond with theoretical general principles for the allocation of decision taking powers. Second, to select a power which is representative of the category for



detailed consideration (powers of compulsory hospitalisation under mental health legislation were chosen) in order to test the theoretically based evaluation, and, more generally, to develop an understanding of the practical advantages and disadvantages of shrieval adjudication.

### **Section One: First Instance Executive Powers and General Principles**

Without indulging in unnecessary repetition, there are two general principles that the legislature should have regard to when legislating. First, it should consider whether the range and nature of the decision taking power allocated under statute involves a degree of "direct political involvement"<sup>1</sup> which is incompatible with the standard of ostensive judicial impartiality.<sup>2</sup> Second, it should consider whether the adjudicatory process been given a task which it is ill-suited to perform, either on account of its functional limitations, or because the task itself is anomalous or anachronistic. Has ostensive judicial competence been compromised?<sup>3</sup>

As was noted in chapters eight and nine, the range of the sheriff's powers as a first instance official has been curtailed.<sup>4</sup> Compared with the number and extent of powers held by sheriffs until well into this century, or extant higher governmental powers, the category is small. Given that, with the exception of powers concerning club licensing and mental health, the majority of powers are seldom if ever exercised, the category is almost insignificant.<sup>5</sup> With the exception of provisions concerning public inquiries and some ex officio duties<sup>6</sup>, all the powers listed in chapter nine concern applications to the sheriff, who is empowered to take final decisions on matters which may loosely be termed "local administration". Sheriffs are entrusted

with a wide degree of discretion. Although the court has traditionally viewed these powers as being "administrative"<sup>7</sup>, it could not be said that any of them involve a significant degree of political content: they do not conflict with ostensive judicial impartiality. The question to ask is whether there is any good reason for the sheriff to be responsible for their exercise: can it be argued that the powers in question are contrary to ostensive judicial competence?

The general theme pursued in this chapter is that there are two broad sub-categories of first instance executive powers. First, there are those which are historical anachronisms: there can be little or no justification for the sheriff's continued involvement. These powers are mainly (although not exclusively) to be found listed in section one (c) and (d) of chapter nine. Second, there are provisions which are not anachronistic in themselves, but which should be freed from association with the sheriff's historical role of local representative of the Crown, which adds nothing to, and may cause confusion within, important modern jurisdictions. The powers which comprise this category can be found in section one (b), (e) and (f) of chapter nine: less weighty provisions in sub-sections (b) and (e) may also be included.<sup>8</sup>

Powers which fall into the first sub-category tend to be those which require the sheriff to perform what is basically an executive function. It is difficult to find any reasons - other than historical ones - which require the involvement of the sheriff. For example, sheriffs are still required to conduct inquiries and perform a variety of other duties under the Burial Grounds (Scotland) Act 1855.<sup>9</sup> The data set out in chapter ten indicated that a small number of applications was made during the sample

period.<sup>10</sup> The powers conferred by the Act have traditionally been viewed as being purely executive or administrative in nature. Lords Dundas and McLaren made this point very clearly in Liddal v Ballingry Parish Council, and Lord McLaren highlighted the sheriff's position as an executive authority when he commented that the "local authority" was "in this case, the sheriff".<sup>11</sup> Their evaluation is supported by the way in which sheriffs have exercised their powers in practice. For example, in Dunblane and Lecropt Parish Council, Petitioner, the sheriff visited and inspected Dunblane Cathedral burial ground personally, before finding it to be "so situated and so crowded with bodies as to be offensive and contrary to decency".<sup>12</sup> The macabre nature of the sheriff's duties was made plain in Ayr Town Council, Petitioner, when, prior to finding a burial ground offensive and contrary to decency, "if not also dangerous to health", it was noted that "human remains are usually found two and three feet from the surface, sometimes only partially decomposed".<sup>13</sup>

The question of why sheriffs are still responsible for this function was raised in evidence to the Grant Committee, and the Report concluded that it was unnecessary for sheriffs to be involved in these matters.<sup>14</sup> Nonetheless, the relevant provisions are still in force. It should therefore be asked whether the degree of "direct political involvement" inherent in the sheriff's function is such that it should be allocated to a local authority. Clearly, it is negligible, and there is no real challenge to ostensive judicial impartiality: on this basis alone it would be difficult to justify change. However, the question of whether it is appropriate for an expert in adjudication to be occupied with such mundane matters requires a different answer. It is surely time to recognise that this particular power is anachronistic, and is simply

a remnant of the public health jurisdiction held by sheriffs at a time when local government was either incapable of carrying out effective regulation, or was not empowered to do so. There is no requirement for adjudication, and accordingly there is no reason for the sheriff's continued involvement: performing functions of this nature does little for the standard of ostensive judicial competence.

Similarly, the only first instance executive function in section one (c) and (d) to be exercised with any frequency is the provision requiring that sheriffs licence private clubs in their court district.<sup>15</sup> As was indicated in the preceding chapter, it was not possible to build up an accurate picture of how many applications are made each year, as it was not possible to obtain access to the registers.<sup>16</sup> However, in the city courts, the sheriff clerks estimated that the number of applications ran into the hundreds for each year.

It is difficult on first inspection to see why sheriffs, rather than the local authority, are still empowered to take decisions. No doubt it was originally intended to maintain a distinction between public houses and private clubs, but given that many clubs now operate large licensed premises, and appeals may be taken from licensing board decisions to the sheriff under s.39 of the Licensing (Scotland) Act 1976<sup>17</sup>, the distinction seems obsolete. Why should it remain? Private clubs may cause the same amount of disturbance to local communities as public premises, and it is surely desirable for questions of local interest, environmental health and fire safety in all licensed premises to be regulated by a single local authority.<sup>18</sup> For as long as Licensing Boards operate under the constraints of the s.39 appeal procedure<sup>19</sup>, there are no real grounds for thinking that local bias against, for

example, the aims or membership of a club could be a factor in the decision to grant or withhold a licence. In addition, whilst it could be argued prior to the Licensing (Scotland) Act 1976 that sheriffs possessed wide discretionary power with regard to the licensing of betting and gaming machines in both public and private premises (sheriffs were able to hear appeals from licensing authorities on their merits<sup>20</sup>), the advent of the s.39 appeal procedure makes the range and nature of the sheriff's first instance power in club licensing anomalous. Why should sheriffs be limited to a formulation not dissimilar to common law judicial review when hearing appeals concerning public licensed premises<sup>21</sup>, and yet be the licensing authority for private clubs, with a wider jurisdiction than local authority licensing boards? It is submitted that there is no clear reason.

Three District Council Solicitors and three sheriffs were interviewed in connection with appeals under s.39 of the 1976 Act: the interview findings are set out in chapter fourteen. However, the opportunity was taken to ask about the sheriff's function in club registration. All the District Council Solicitors felt that the sheriff's position was difficult to justify. For example, one commented that: "It [ie the sheriff's power] does seem an extremely anomalous and inappropriate function for sheriffs." A commonly held concern was that the sheriff court process did not provide the same public health and hygiene standard as the district council was able to in public premises. Another solicitor stated:

"All licensed premises are inspected by environmental health authorities to check that they are up to standard, but they do not get a foothold in private clubs which may well offer services to the public. For health and hygiene reasons

safeguarding is required.... I think that club registration should go to the District Licensing Boards."

It was noted by the third solicitor that councillors on his authority had been frustrated by the fact that complaints over late night disturbances went to the sheriff, rather than the District Council.

The sheriffs themselves had clearly given little thought to their role in club registration, beyond checking any objections, and fire and police certificates. One sheriff did, however, note that, "The origins of the function are that clubs are private organisations - but nowadays as we all know many clubs are as public as the public house next door." There were no strong views on the subject, and none of the shrieval interviewees were perturbed at the suggestion that their club registering function should be allocated to district councils.

It would be difficult to argue that the power to license private clubs could be construed as an area of business which is likely to have any real implications for the ostensive impartiality of sheriffs. However, it can be appreciated that the allocation of this function to the sheriff is now no longer appropriate on the grounds that it is contrary to ostensive judicial competence. The sheriff is primarily an adjudicator, and it is difficult, if not impossible, to see why a highly paid judge should be involved in this type of routine regulation, when there is no requirement for adjudication. There is therefore a strong case to the effect that club licensing should become a local authority function: appeal could lie to the sheriff from the licensing board decision, as is the case in appeals concerning public licensed premises.<sup>22</sup>

Other powers which were not exercised at all in the sample taken in chapter

ten also appear to be anomalous. Why, for example, are sheriffs still charged with executive responsibilities concerning harbours and docks?<sup>23</sup> The recent case of Western Isles Islands Council v. Caledonian MacBrayne indirectly raised the question of whether it is appropriate for modern judges to continue to supervise the alteration of local authority bye-laws in the event of harbour development.<sup>24</sup> Similarly, why should it still be thought necessary to appoint senior members of the judiciary as Commissioners for the Northern Lighthouses?<sup>25</sup>

It is difficult to argue that these jurisdictions should continue: they should be viewed as being at odds with the standard of ostensive judicial competence. The only real argument to support the status quo with regard to these and similar powers is that sheriffs would rarely if ever be expected to carry out their statutory functions, and so there is no real cause for concern. However, it is contended that this is not a particularly good argument, as, if viewed in a wider context, it condemns the sheriff's jurisdiction in local administration to anachronism, thereby denying the potential that Sheriff Court adjudication has as a means of providing statutory review of local administration at a local level.

The second sub-category of first instance executive powers<sup>26</sup>, those which are neither anachronistic, nor contrary to the standards of ostensive judicial impartiality and competence, raises different issues. Some of these powers are, in terms of their consequences for individuals, the most weighty and important of the sheriff's functions in local administration.<sup>27</sup> The main points for consideration are the effectiveness of shrieval adjudication as a decision taking process, and the appropriateness of the continued association with the historic governmental



jurisdiction.

What sort of functions are sheriffs required to carry out? There are a number of common features which link the powers in this sub-category. The sheriff is usually empowered to decide applications made by public authorities, and is able to exercise a wide and final discretion. Some of the applications may involve important civil liberties: for example, should the elderly be removed to hospital because they are incapable of caring for themselves<sup>28</sup>, or should individuals be compelled to submit themselves for a medical examination against their wishes?<sup>29</sup> Others are, however, rather more mundane: for example, sheriffs are also responsible for deciding on local nuisances.<sup>30</sup>

The data set out in chapter ten indicated that one of the most frequently exercised example of a section one (f) power, was compulsory hospitalisation of the mentally ill under the Mental Health (Scotland) Act 1984.<sup>31</sup> Accordingly, it was selected for detailed discussion and empirical study.

## **Section Two: The Compulsory Hospitalisation of the Mentally Ill**

### **(i) Introduction and Research Objectives**

Sections 18 to 22 of the Mental Health (Scotland) Act 1984<sup>32</sup> provide for the compulsory hospitalisation of a patient suffering from a mental disorder for a period of up to 6 months. It should be noted at the outset that most patients in hospital are voluntary patients, and that separate procedures exist for emergency detention, short term detention, interim detention and the care of the criminally insane.<sup>33</sup> Compulsory hospitalisation follows from the approval by the sheriff of an application made by



either a mental health officer or a statutorily defined nearest relative, which has been supported by two medical recommendations.<sup>34</sup> In practice, most applications are made by mental health officer. The sheriff has a wide and final power of decision, and extensive provision is made for the purpose of making "such enquiries and [hearing] such persons [including the patient] as he sees fit."<sup>35</sup>

As indicated above, it would indeed be difficult to suggest that the allocation of these powers to the sheriff by the legislature was contrary to the general principles set out in chapter two. The nature of the issues under consideration do not involve strong political or polycentric considerations. This is not to claim that they are not present. For example, a shrieval decision may have implications for social work or hospital policy. However, it is clear that the degree of significance which should be attached to these factors is very much less than issues such as the health and civil liberty of a patient, or whether a patient might prove a threat to public safety. Ostensive judicial impartiality and competence, and the wider values of the rule of law are not challenged by the sheriff's function.

The question of whether or not shrieval adjudication is the appropriate decision taking process should therefore be answered in the affirmative. The central issue for consideration by the sheriff is whether a patient should be deprived of liberty, held in a locked hospital ward, and subjected to a regime of drugs against his or her will. Adopting Mullan's terminology, this is an area of decision taking which requires a great deal of attention to be given to matters of procedural fairness and natural justice, as the sheriff's function is one "requiring straight law/fact determinations and resulting in serious consequences to individuals."<sup>36</sup>

The primary aim of the empirical investigation into how the compulsory hospitalisation process operates in practice is to assess the effectiveness of shrieval adjudication as a means by which patients' rights are protected, and to identify ways in which the process can be made more efficient. As indicated above, criticism of powers solely on the grounds of whether or not they contravene the ideal standards of ostensive judicial impartiality and competence would be lacking. The strengths and weaknesses of shrieval adjudication as a decision taking process should also be considered. It is not necessarily enough to argue that decision taking in the sheriff court is appropriate: the quality of the decision taking should also be evaluated. However, before detailed consideration is given to the research findings, the implications of the supposedly "administrative" character of the sheriff's powers should be examined: is the tenacity of the "ministerial" or "administrative" tradition potentially or actually detrimental to modern development and practice?

It is important to note that the Act expressly states that the powers and the jurisdictions of the sheriff when conducting the hearing and investigation are the same "as if [the sheriff was] acting in the exercise of his civil jurisdiction", and that in all appeals to the sheriff, the patient has a right to be heard.<sup>37</sup> These rather enigmatic provisions have been taken to mean that Parliament does not expect sheriffs to carry out a judicial function. The courts have accordingly interpreted these provisions as being references to the sheriff's "administrative" jurisdiction.<sup>38</sup> The "administrative" nature of the power to hospitalise was stressed by the Inner House in T.F. v. Management Committee of Ravenscraig Hospital.<sup>39</sup> The case centred around the issue of whether or not the sheriff was acting "administratively" or "judicially" under

section 113(1) of the Act which concerned the patient's right to be heard. If the sheriff was acting judicially then appeal to the Court of Session would have been competent; conversely, if the power was administrative, the sheriff's decision was final. The court held that the power was "administrative" in nature, and that further appeal was therefore incompetent.<sup>40</sup>

The argument accepted by the court was comparatively uncomplicated. Following Arcari v. Dumbartonshire County Council, it was held that the distinction was one which should be resolved after a close interpretation of the provision in question. The court decided that a judge who did not give a party to a judicial process the right to a hearing "would contravene all of the basic principles of natural justice. He would be acting unjudicially and would not need to be told so."<sup>41</sup> The fact that it was felt necessary to state that a patient had the right to a hearing was held to indicate that the proceedings could not possibly be judicial, and must therefore be administrative. The argument only appears coherent when the weight that was attached to the sheriff's traditional ministerial role is appreciated. The court noted that the "involvement of the sheriff in the control and the treatment of the mentally ill is no new thing,"<sup>42</sup> and went on to point out that the;

"... role of the sheriff in the detention, control and discharge of persons who suffer from mental illness goes back far beyond the Mental Health (Scotland) Act 1960. That role has consistently been regarded as administrative since it began. Sheriffs and sheriff substitute, now sheriffs principal and sheriffs, have exercised these functions exclusively and finally throughout."<sup>43</sup>

This is undoubtedly the case, as should be clear from reference to the historical

chapters above. The court went on to state; "We consider it to be inconceivable that the character of this role should be altered other than by legislative provision, expressly or by the clearest implication."<sup>44</sup>

Unfortunately, it is not clear from Hansard<sup>45</sup> whether parliamentarians were even aware that sheriffs had an administrative jurisdiction. The parliamentary debate on the relevant provision is fragmented and of a low standard. However, it would appear that the intention of the legislature was essentially directed towards securing an adherence to a decision of the European Court of Human Rights and the European Convention on Human Rights, which stipulate that those who are the subject of compulsory hospitalisation proceedings should have the right to judicial review.<sup>46</sup> Accordingly, it is difficult to avoid the conclusion that the court, in giving such strong support to the administrative tradition in mental health, was perpetuating something of a legal fiction.

It is also evident that, as so often in the past, the court itself was unclear as to what an administrative power actually is. Whilst the consequence of a provision being deemed to be administrative (i.e. no further appeal) is clear enough, describing the nature of an administrative provision proves to be rather more difficult. Nonetheless, the court made an interesting attempt; "they [the decisions] were all administrative acts. In every case the sheriff was acting as integral part of the administrative process. He was not being invited to deliver judgment on a question of law."<sup>47</sup>

Notwithstanding this development, it must be wondered whether the reincarnation of the administrative distinction was necessary. Given the sheriff's important role as guardian of civil liberties, it is argued that beyond indicating to

sheriffs that they should never view their mental health jurisdiction as being civil or criminal business, the administrative tag is irrelevant and potentially unhelpful. It deflects attention away from more important issues - the main one being the question of how to ensure that the adjudicatory process functions effectively as a safeguard of patients' civil liberties in modern mental health law. As is made plain below, there are serious areas of concern which are rather more deserving of attention than arcane distinctions in sheriff court function.

## **(ii) Fieldwork Methodology and Objectives**

Fieldwork was carried out between 1987 and 1989. Five senior Mental Health Officers (MHOs "A" to "E"), five consultant psychiatrists (CPs "A" to "E"), six sheriffs (Sheriffs "A" to "F"), and senior staff at the Mental Welfare Commission (MWC) and Scottish Association for Mental Health (SAMH) participated in one hour long semi-structured interviews. The participants agreed to be interviewed on the understanding that they were to remain anonymous. Whenever possible, the consultant psychiatrists and MHOs were based in the selected sheriffs' court districts. The purpose of this was to build up a sample group which provided a picture of how professionals from five different hospitals interacted with each other and their "local" sheriffs. The interviewees themselves were unaware of this arrangement, in order that they would not feel constrained during interview. Most of the interviewees were extremely helpful, and were very frank about the process, together with the problems which were felt to exist. It was not possible to interview patients and ex-patients. The reason for this was primarily practical. Although the research findings should be

viewed in this context, the information provided by SAMH, MHOs and the MWC was essentially concerned with the patients' point of view.

### **(iii) Research Findings**

In keeping with the wide ranging nature of the study, consideration was given to the hospitalisation process as a whole, although the focus was on the effectiveness of shrieval adjudication. Discussion is split up into two categories: (a) the pre-hearing stage, and (b) the hearing itself.

It should be noted at the outset that the consensus amongst most interviewees was that the shrieval review of section 18 applications was in the best interest of patients, and that any changes to extant practices should be in the nature of "polishing up" the decision taking procedure, rather than any radical reform. It was felt that the section 18 procedures were an improvement on those of the Mental Health (Scotland) Act 1960.<sup>48</sup> However, it is contended that there were a number of areas of concern: shrieval adjudication, although perhaps the most appropriate decision taking process, has a number of serious flaws.

### **(a) The Pre-hearing Process**

#### **The Decision to Hospitalise**

All interviewees agreed that the majority of patients who require compulsory hospitalisation are already in hospital under section 24 (72 hours detention) or section 26 (20 days detention); however, in one hospital with a large rural hinterland, most patients come directly to a section 18 hearing from the community.

The purpose of the hearing before the sheriff is to protect the rights of a person who wishes to challenge a medical recommendation that they should be deprived of liberty in order to receive compulsory treatment for mental illness. It is therefore a matter of concern that many of the MHO interviewees were concerned that patients could be pressurised into consenting to be "voluntary" patients by medical staff, thereby bypassing the right to a hearing before the sheriff. Clearly, the effectiveness of any hearing process depends on applicants having unrestricted access to the court.

MHO "C" felt that some patients had been presented with a "Hobson's choice - no real choice at all" by some consultants on this vital question. MHO "A" agreed and felt that the patients could be put in a "Catch 22 position" when confronted with the choice of "either you stay in as a voluntary patient, or the medical evidence is such that you will be compulsorily detained." It was recognised by MHO "B" "that there was a fine line between heavy persuasion and coercion", and the majority of interviewees stressed that most psychiatrists were motivated by a concern for the wellbeing of patients.

However, MHOs "A", "B", "C", and "D" all felt that medical staff were not concerned enough about the civil liberties of patients, however well intentioned they may be. For example, MHO "C" commented that "doctors are quite arrogant about civil liberties", and that "coercion is a very powerful determinant" in a patient's decision to become a voluntary patient. Only one consultant psychiatrist agreed that this was not completely without foundation. Consultant Psychiatrist "A" stated that the "honest answer is that psychiatrists are arrogant, but they would also think that



they know best [and] would see the patient's right to treatment against his will as being a more important civil liberty in comparison to his actual liberty: denying treatment is a more serious abuse of civil liberties."

This approach is rather different from that taken by MHO "B", who commented that the most important civil liberty is "the right to chose treatment yourself, rather than have it forced on you, and if things go further the right to have a judge and not a doctor decide on your future". It is submitted that it is this interpretation which is in the spirit of the legislation, rather than that of Consultant Psychiatrist "A": although his argument is entirely justifiable, the legislation is nonetheless clear that a hearing should be provided should the patient wish one.

The comments of Consultant Psychiatrists "B" and "D" are more representative of the views held by the medical interviewees. Consultant Psychiatrist "B" stated that he was aware of the danger of presenting himself in such a way that he could coerce a patient into becoming a "voluntary" patient against his or her will: "I am aware that there is a danger of presenting an overpowering impression to the patient." The views of Consultant Psychiatrist "D" were similar. He felt that doctors had to remember that the question of whether or not a patient should be hospitalised was "a balance - is the medical condition such as to justify as overruling a person's civil liberties?" On the question of a patient being faced with a "Hobson's choice", he commented that: "it is matter of how you present it. I think it is outwith the spirit of the Act to coerce - the doctor should always say to the patient "You have the right to object.""

Despite the generally thoughtful and responsible approach which consultant psychiatrists appear to take to the issue of the patient's right to choose to have a



hearing, it was alarming to find that MHOs "A" and "B" had been involved in a case where a senior psychiatrist had advised the Social Work Department that a patient was consenting to hospitalisation when, in MHO "A"'s words, "in fact she was not [and] the ward staff said this person was not consenting". MHO "B" went on to say, "I think in this case, the person concerned [i.e. the consultant psychiatrist] just could not be bothered with the "hassle" of going to court and decided that his decision was that the patient was not going to argue... At the end of the day the person was detained... but she had wanted to exercise her right [i.e. to a hearing]". Nor would it seem that this was necessarily an isolated incident: MHO "A" stated that "these things do happen".

Some sheriffs also felt that there was a possible cause for concern, although by its very nature the issue is one which is not likely to come to the attention of the court: sheriffs can only hear cases in which the patient has objected to a medical recommendation. However, views were mixed. Sheriff "B" was very seriously concerned at the prospect of patients being denied access to the court, and, with the above example in mind, rightly so. He made a very strong statement, leaving no doubt that in his eyes the issue was an extremely serious one: "it would concern me because... the issue at stake is the liberty of the individual: I would be concerned if a doctor was in effect to say "you will either agree or else". You are getting Hobson's choice and Hobson's choice means no choice... By proceeding in that way is compelling the patient to accept the treatment, and that is not voluntary treatment.... I think that it would be quite wrong, highly unfair and highly improper". He went on to say that he would regard this type of pressure as being similar to the police

proceeding on improperly obtained evidence, where coercion is involved.

Sheriff "A" knew of at least one case where it appeared that doctors had tried to, in effect, coerce the patient into hospitalisation. He too felt that some psychiatrists did not give proper consideration to the question of the patient's civil liberties: "sometimes you do get the impression that the doctors tend to say, "Well we want to treat this chap... if he's maybe thrown a tantrum or something", ... rather than deserving a six months loss of civil liberties." However, he was also conscious of the fact that it was sometimes very difficult for doctors to tell patients that they require hospitalisation without potentially appearing coercive, and he appreciated that it was very likely that in many cases it might be felt to be in the patient's best interest to avoid a hearing, which could be extremely traumatic; "It is a difficult question - to be fair, doctors do give the impression that the best way of treating them is to get them in the hospital and keep them there - but normally they have got very good reasons for seeming to take that attitude." He reiterated this point by stressing that there was "no reason to suspect that they [i.e. consultant psychiatrists] are not sympathetic towards the patients."

Sheriff "C" was rather less concerned about the issue than either Sheriffs "A" or "B". His impression was that medical staff were aware of the civil liberties aspect of hospitalisation and that they took care not to appear coercive when recommending to patients that they consider admitting themselves, rather than initiating the compulsory hospitalisation procedure. He felt that the procedures which had been introduced by the 1984 Act involving qualified MHOs<sup>49</sup> and shrieval hearings, made doctors more aware of the value of civil liberties. He also expressed some sympathy

with the position that doctors could find themselves in, commenting that it was "very difficult for people to understand their civil liberties when they do not know what is wrong with them".

The issue is clearly a complicated one, and it is not being suggested that consultant psychiatrists are generally thoughtless or irresponsible in the way that they exercise their powers under the Act. The majority of patients are no doubt happy to accept the medical recommendation and are, by virtue of the fact that an application has been made, very seriously ill. Some are suicidal and a danger to those around them. However, the incidents referred to by MHOs "A" and "B", and Sheriff "A", together with the wider worry that there was a danger of coercion (whether it be intentional or otherwise), are such as to give rise to genuine concern. As Sheriff "B" pointed out, the issue which is of paramount concern is the liberty of the individual - something which should only ever be denied under the most stringent safeguards. Viewed from this perspective, there is enough evidence to suggest that procedures could be made more effective.

Identifying the potential for problems is comparatively simple, but suggesting solutions which would not prove inefficient or counter productive is rather more difficult. One interviewee suggested that the sheriff should have a wider ranging power over all mental patients, whether voluntary or not, which would involve sheriffs in authorising all hospitalisations. It is, however, difficult to see how this would work in practice without the sheriff becoming a meaningless "rubber stamp" for medical decisions. It was this type of situation which was perceived by interviewees as being one of the main flaws in the Mental Health (Scotland) Act 1960.<sup>50</sup>

A more workable alternative was suggested by MHO "B", who wanted sheriffs to take a much closer interest in their local hospitals. He felt that the sort of situation that he and MHO "A" had encountered would be very much less likely to occur if the sheriff was to make regular inspections of hospitals in the jurisdiction: "having someone like the sheriff coming into the hospital would make some people buck up their ideas - even if he was just on a magisterial progress through the building, people would say "The sheriff is here - we had better watch out.""

Interestingly, this was precisely the function that sheriffs used to perform as part of their original governmental jurisdiction under early mental health legislation.<sup>51</sup> Apart from this precedent, there is another reason to support a return to shrieval inspections. MHO "B" pointed out that it seemed anomalous that sheriffs should be content to hospitalise patients for a period of six months without appearing to have any interest in conditions in mental wards: "I would like the sheriffs to see the conditions in which people are detained - they may start to understand the reservations of some of the patients. There are certain wards where the level of care is not very good, and it would be an improvement if the sheriff had an oversight of that."

To conclude consideration of this point, it is recognised that solutions are most likely to be found once all the parties involved are able to recognise that there is at least a potential problem. On the basis of the research findings it would seem that some of the medical and shrieval interviewees would need to be convinced. Perhaps the views expressed in this chapter might go some way towards doing so. There are no doubt many effective suggestions which could be made, and it is submitted that debate on this issue should be initiated. Given that the effectiveness of a shrieval

hearing, adjudication and the protection of civil liberties are at issue, sheriffs, legal practitioners and academic lawyers should not stand back from participation.

### **The Availability of Legal Aid and Representation**

The second issue which was identified as a cause for concern at the pre-hearing stage of compulsory hospitalisation was the availability of legal aid and legal representation for patients and nearest relatives.

It is again rather alarming to find that patients wishing to challenge a compulsory hospitalisation recommendation must qualify under the increasingly restrictive means test for civil legal aid.<sup>52</sup> With the surprising exception of sheriffs, many interviewees felt strongly that legal aid should be automatically available free of charge to any patient who wished representation, most particularly because MHOs (who in practice make the vast majority of applications) are automatically represented by regional council solicitors. It was argued that the position of a patient wishing to challenge an application is fundamentally different from that of a person wishing to defend their rights in a normal civil action concerning, for example, a matrimonial dispute or a nuisance. Patients feel themselves to be defending their very right to liberty, and are often extremely ill and unable to articulate their viewpoint effectively. Consultant Psychiatrist "C" was strongly critical of the legal aid hurdles that faced patients<sup>53</sup>, arguing that "this is a particularly vulnerable group of people - it seems foolish and anomalous to make them pay for part of their psychiatric care." The central point which was made by a number of interviewees was that the applications should be seen as part of the administrative process of health service treatment, and

should on this ground alone be free. It is argued that this interpretation is in the spirit of the legislation, which, as mentioned above, distinguishes the hearing before the sheriff from ordinary civil business: the sheriffs powers should be viewed as being part of a modern, special provision for civil liberties in mental health treatment.

Further concerns were voiced concerning the uncertainty of the legal costs which could face a nearest relative wishing to make an application for the compulsory hospitalisation of, for example, a seriously ill husband or wife. However, as mentioned above, the vast majority of applications are made by MHOs and hospital authorities in part to avoid the legal costs for nearest relatives, and also to defuse tensions which could arise out of the initiation of the compulsory hospitalisation procedure by a close relative. Indeed, it would seem that in practice there is little if any cause for concern as regards legal aid and representation for nearest relatives.

A central factor which can prevent patients from securing legal aid and representation is time. As noted above, many of the patients who are hospitalised compulsorily for a six month period are already in hospital under short term detention. At the time fieldwork was being carried out, which was prior to the Mental Health (Detention) (Scotland) Act 1991<sup>54</sup>, the legislation<sup>55</sup> required that detention under section 26 (28 days short term detention) could be continued only if the application had been correctly made out, approved by the sheriff and received by the hospital before the end of the detention period. The 1991 Act provides that hospital authorities can apply to the sheriff to extend a section 26 detention by 3 days<sup>56</sup>: it does not address the central problem.

The important point to note is that if hospitals wait until the last possible day

to make their application (as they frequently do) it was felt that some patients are unable to obtain representation when they require it, that solicitors occasionally have to provide their services on a "grace and favour" basis, that it has sometimes been impossible to obtain expert witnesses (who are important in any serious attempt to challenge medical recommendations), and that cases are not always fully prepared. Whilst there was praise from all participants (in particular from sheriffs) for solicitors who were prepared to take on work at short notice without any guarantee of payment, it is clear that the situation is an unsatisfactory one.

Shrieval interviewees made a number of recommendations with this problem in mind. Sheriff "B" felt that the hospital authorities should be under a statutory requirement to submit their application for compulsory hospitalisation at an earlier stage: this would enable the patient to instruct a solicitor and, if required, obtain a medical opinion. However, this suggestion would have to be balanced against the point that the medical authorities may have strong clinical reasons - not least of which would be a desire to see how the patient is responding to treatment - for holding back until comparatively late in the 28 day period before recommending further hospitalisation. This point was illustrated graphically in the B v. Forsley case, and indeed gave rise to the 1991 Act.<sup>57</sup> Sheriff "B" also felt strongly that sheriffs themselves should be able to grant legal aid for section 18 cases, as under section 29 of the Legal Aid (Scotland) Act 1986.<sup>58</sup> As an alternative, Sheriff "A" felt that the delay in the legal aid process could be avoided by permitting solicitors to arrange legal aid over the telephone, rather than by more complicated (and time consuming) form filling. Adopting a different approach, Sheriff "E" argued that sheriffs should



be able to extend the section 26 detention order for a limited period of seven days in order to enable a patient to prepare his case for hearing. This would provide sheriffs with powers similar to that held under section 42(6) of the Social Work (Scotland) Act 1968<sup>59</sup> (as amended) which enables a sheriff to detain a child prior to a children's hearing. Clearly, the Mental Health (Detention) (Scotland) Act 1991<sup>60</sup> would now have to be taken into account in any such reform, but the rationale for allowing sheriffs to extend detention to enable a patient to prepare a case still stands, as the 1991 Act serves an altogether different purpose.<sup>61</sup>

Any changes to current practice are likely to require statutory revision. However, it is argued that the de facto time limitations which are placed on patients are such that they hamper the effectiveness of shrieval adjudication as a means of protecting civil liberties. It is submitted (albeit tentatively) that the most effective solution would be to enable sheriffs to grant legal aid themselves, and to extend section 26 orders for a strictly limited period if this was required. As indicated above, there are similar safeguards in child care law, and given that the mentally ill are a equally vulnerable group, there is a strong argument for their extension to the compulsory hospitalisation process.

### **(b) The Hearing**

The question of whether adjudication before the sheriff was effective as a means of protecting the civil liberties of patients drew a mixed response. There are a number of points to be considered.



### One Shot Performer v Repeat Performers?

For an adjudicatory process to be effective it has to be structured in such a way that it encourages the full participation of both parties.<sup>62</sup> Following on from the points made above, it is clear that the fact that the majority of patients are unable to secure legal representation poses something of a problem, in that they lack the forensic skills and legal advice of a solicitor. The central issue is whether the process makes allowances for this, and avoids the most negative aspects of adversarial adjudication, which are so lucidly illustrated by Gallanter's model of the "one shot performer" versus the "repeat performers".<sup>63</sup> It became apparent that there are some serious problems.

There was concern that patients who exercise their right to a hearing were likely to be distressed by the fact that the hearing would (in most cases) take place in the court building; it was felt that the connotations of criminality would be overwhelming for the majority of patients. Most interviewees felt it to be generally inappropriate for the hearing to be conducted in a traditional court room, preferring either a hearing in chambers or one in the hospital itself. A further problem which was identified was the difficulty encountered by patients in the court waiting room. Senior MHO "B" commented: "sometimes we have waited for over an hour to actually go into court - if you have got a patient who is upset and possibly hallucinating from my position as somebody who actively wants to get someone treated its great! But from a fairness point of view it is not". Some felt that sheriffs were not averse to coming to the hospital, but that sheriff clerks were unwilling to make the requisite arrangements.

The response of sheriffs to these general issues was very constructive and it was clear that they had given a considerable degree of thought to them. However, it is interesting to note that the sheriffs' individual interpretations of what is desirable varied quite considerably. Sheriffs "A" and "C" felt that it was "most inappropriate" for section 18 hearings to be held in a traditional court room setting, and expressed a willingness to travel to the hospital itself if it was felt to be necessary: it was argued strongly that the sheriff should take whatever steps are required to put the patient at ease. Normally, however, hearings took place in chambers. If a patient was sceptical that he was actually being heard by a judge, a flexible approach was taken, and the hearing would take place in a court room. Sheriffs "D" and "E" occasionally held their hearings in a court room, but felt this was acceptable because their court houses were particularly well appointed, and there were suitable, informal civil court rooms: unless the patient was very ill, they preferred not to go to the hospital. Sheriff "B" took a very distinctive approach, and made a point of holding all hearings in a normal court room (although never in open court). On principle, he disapproved of visiting the hospital and would only hold hearings in chambers if the patient was not present. His argument was that the patient should be absolutely clear that his case was being dealt with by an ostensibly impartial judge, although not a criminal court: "If I were sitting in the hospital, I would be seen as being part of the hospital as opposed to being separate from it". All sheriffs felt that the patient should be protected from any taint of criminality or suspicion that the sheriff was conspiring with the medical authorities: however, it can be appreciated that opinions differed as to how this could best be achieved.

The visual impact on a patient of a sheriff in full judicial garb also attracted strong criticism from some interviewees as it was felt that this would reinforce unhelpful connotations of criminal guilt. It was also felt that some sheriffs (very much the minority) were prone to forgetting the delicate nature of mental health cases; three interviewees stated that patients had been referred to inadvertently as "the accused". The question of the suitability of judicial garb again drew a mixed response from sheriffs. Sheriffs "A" and "C" were again in agreement that the wig and gown were highly unsuitable, and could only serve to heighten any misapprehensions that the patient might have as regards the nature of proceedings. In the small minority of cases where patients wanted reassurance that they really were sheriffs, they were prepared to don their robes. Sheriffs "D" and "E" had no strong feelings on the matter, and tended to wear wig and gown if they were in the court room, but not if they were in chambers. Sheriff "B" felt emphatically that judicial garb was necessary to ensure that the patient was in no doubt that his case was being considered by an ostensibly impartial judge, rather than one who "would not obviously be a judge, but just someone sitting on the other side of a desk". He did not appear to have considered the point that an uninformed patient might feel that he was facing a criminal prosecution. It is submitted that Sheriffs "A" and "C" were correct in their approach to these issues.

### **The Sheriff - A Rubber Stamp or a Safeguard?**

Beyond these matters of style, which can, however, be seen as being of considerable importance to patients' perceptions of the hearing and how they were

able to participate in them, there are other issues for consideration. Are hearings conducted in such a way that patients are able to present their case as effectively as possible? Do sheriffs make allowances for their state of health and the fact that the majority are unrepresented? Is the value of the adjudication lessened by functional limitations which make it difficult for sheriffs to assess psychiatric evidence? Does adjudication serve as an effective safeguard of patients' rights, or a legal rubber stamp for medical opinion?

Most interviewees were in favour of sheriffs taking an informal and interventionist role in proceedings, although this was balanced by an appreciation of the need to ensure that "justice is seen to be done". It was generally felt that sheriffs were very sympathetic to patients and were usually ready to adopt a relaxed, inquisitorial approach - especially if there were no solicitors involved (i.e. acting for either the patient or the hospital authorities). The term "inquisitorial" seemed to be used to denote a high degree of judicial intervention, rather than a continental style of procedure. Some interviewees felt that if patients were represented, their chances of avoiding detention were increased, as "wily" solicitors would ensure that their clients did not give evidence: this was felt to be potentially dangerous.

All sheriffs thought it important to ensure that the patient should be made to feel as calm as possible. All were aware of the need to strike a balance between creating an informal atmosphere and at the same time ensuring that procedural formalities matched the gravity of the issues at stake. However, as may be surmised from the following statements, opinions differed as to where the balance lay. For example, Sheriff "A" conducted hearings "rather like a children's hearing"<sup>64</sup>: I ask the

medics to put forward their case fairly briefly, and let the patient or his representative ask their questions, quite often the patient just wants to chat with the sheriff". Sheriff "C" took a similar approach, and commented: "I strongly feel that the last thing you want to do is to make the patient feel like an accused or something - and if you run it like a normal court hearing you will do that". However, Sheriff "B" maintained the essence of court procedure: "the hearings are more informal than criminal and civil hearings, but not necessarily more relaxed, because the issue is a matter of some considerable importance - the liberty of the individual".

There was inevitably a high degree of judicial intervention when solicitors were not present, but if there was representation then the hearing tended to become more of an adversarial contest. The sheriffs felt that they were careful to ensure that patients were not questioned in an insensitive fashion, and that unsuitable techniques of criminal advocacy were excluded from the proceedings. All sheriffs felt that it was an issue of paramount importance in accordance with the rules of natural justice and fairness generally to allow the patient every opportunity to speak out and express their opinions, should they wish to do so.

Opinions were mixed on the question of whether the adjudication provided an effective safeguard of patients' rights or was essentially a rubber stamp for medical opinion. It was noted that whilst the majority of cases were straightforward and led to detention, sheriffs were increasingly likely to question medical recommendations, although there was wide variation between individual sheriffs. There was sympathy for the sheriffs' position in difficult cases from MHOs and consultants, but also concern about some of their decisions. For example, Consultant "B" commented that

"sheriffs have overturned our decisions - sometimes to our considerable alarm when we feel our patients are particularly dangerous".

The nub of the issue appeared to be the ability of the generalist sheriff to assess the patient's mental condition in borderline cases. There were questions regarding the grounds of granting or refusing to grant recommendations. Some interviewees claimed that, in taking the layman's view, sheriffs were either too reliant on medical evidence, or, if they took a more testing approach, unclear as to their competence. For example, Consultant "A" stated: "in theory the sheriff is a safeguard, in practice not - I hesitate to call it a conspiracy, but doctors and the sheriffs are part of the "Establishment". If a doctor says in good faith that a patient should be hospitalised, few sheriffs will overrule that", whereas MHO "D" noted that, "sheriffs sometimes challenge diagnoses and they are not qualified to do that".

Many interviewees felt that sheriffs should have a basic training in mental health issues. Others felt that the use of "reporters" or curators ad litem would provide sheriffs with valuable information in difficult cases. A small minority thought that in the few cases where conflicting psychiatric evidence was led, the sheriff should be assisted by an assessor. In general terms, however, it was felt that it was important to retain the sheriff as an impartial outsider skilled in weighing arguments, as the final decision taker: the sheriff was felt to "concentrate the mind" of the professionals, allow the patient to state his case to an outsider, and make relations between the hospital staff and the patient less strained after the hearing.

There was an interesting variation in the views of sheriffs on the question of whether the hearing provided a safeguard of the patient's rights. All felt that it did

prevent clear abuses, but that it had varying degrees of utility. Sheriff "B" saw the hearing as "an extremely important, vital safeguard". He did not view his role as a "rubber stamp" for medical evidence in any way. Sheriff "C", however, felt that mental health applications stood out "like a sore thumb" from the rest of the sheriff's business, and that he was not completely happy with taking "on the merits" decisions. He would have preferred the initial decision to "section" a patient to lie with a local mental health tribunal, operating in a similar fashion to a children's hearing, with an appeal to the sheriff. On appeal, he felt that the sheriff should be limited to considering the case on the same basis as under section 39 of the Licensing (Scotland) Act 1976 (i.e. to ascertain whether the tribunal erred in law, based its decision on an incorrect material fact, acted contrary to natural justice, or exceeded its discretion in an unreasonable manner). The consensus of opinion (excluding Sheriff "B") was that the view of the sheriff as a rubber stamp was not without some foundation, as it was extremely difficult to refute two medical recommendations; in any case, most applications were straightforward, and there was no real objection from the patient. Thus, the sheriff's role was seen by Sheriff "A" as being a "cosmetic safeguard" in the vast majority of applications. Sheriff "C" commented that "given that there are two medical practitioners testifying that there should be a hospitalisation, that the patient usually has symptoms of mental illness and that there is no contrary professional view, it is not surprising that most appeals are refused". Sheriffs "A" and "C" usually saw their main tasks as making the patient feel as happy as possible with the inevitability of hospitalisation, and defusing any tensions between the hospital staff and the patient arising out of the hearing.



In the small minority of contested cases where there were conflicting medical opinions, the majority of sheriffs felt that the evaluation of evidence could be difficult, but that their experience of hearing experts in a wide variety of cases enabled them to reach a satisfactory conclusion. It was felt that expert medical evidence could be evaluated by testing the factual grounds upon which psychiatrists' diagnoses are based.<sup>65</sup>

The sheriffs were unimpressed by the idea of assessors to assist them in difficult cases, feeling that this would merely confuse the issue: however, it was thought that, in some cases, a report from a curator ad litem could be very useful (Sheriff "B" dissenting). Sheriff Macphail commented in response to a draft copy of this chapter<sup>66</sup> that the sheriff embarks on a section 18 hearing knowing remarkably little about the patient. He noted that the application with its two medical recommendations is always too brief and says very little about the patient's family background or medical history. Application forms do not even state the patient's age. He felt that it would be extremely useful to have a report, similar to a social inquiry report, outlining these other matters. The proposal that sheriffs should have a basic training in mental health issues was rejected by all sheriffs. It was felt that the layman's approach to medical recommendations should be retained, and that "a little learning is a dangerous thing".

In summary, it is argued that, although there are bound to be difficulties with the evaluation of expert evidence<sup>67</sup>, shrieval adjudication is the most appropriate means of reaching decision. Sheriffs should continue to use their own discretion on the question of how rigorously they should test medical evidence, but it is suggested



that the fact that there appeared to be something approaching a consensus amongst the interviewees that the sheriff court process is a "rubber-stamp" must be viewed as a cause for concern: this is clearly not the role which the legislature had in mind for the court. Similarly, as Sheriff Macphail has indicated<sup>68</sup>, it is surprising that sheriffs have so little documentary information laid before them when considering an application. It is argued that, as a matter of urgency, new forms should be devised, which should give to sheriffs more accurate and detailed information on the patient.

### **Section Three: Summary and Conclusion**

The functions which the sheriffs perform as Parliament's first instance executive officers are now comparatively few. They can be divided into two general sub-categories. The first is comprised of minor ex officio and executive powers which appear to have been continued without any real justification, other than their connection with the ministerial tradition. The second is also derived from this tradition, but involves sheriffs in taking decisions which may have serious consequences for the individuals concerned.

None of these powers can be viewed as being contrary to the standard of ostensive judicial impartiality. The question which is considered above is whether they should be criticised on the grounds that they challenge the standard of ostensive judicial competence.

It is contended that the first sub-category of powers is contrary to ostensive judicial competence, and that its constituent powers should be viewed as being anachronistic and anomalous. There is little justification for their continuation.

Whilst the powers in the second sub-category are not contrary to the standard of ostensive judicial competence, it is argued that, as the fieldwork example illustrates, the continuation of the ministerial/administrative tradition is anachronistic, and does little to further the development of important and weighty powers in a modern context.

The research into the sheriff's jurisdiction in mental health also illustrates the point that while shrieval adjudication is a generally effective decision taking process in cases with a low political content and polycentric effect (and a strong effect on the rights of the individual), there is still considerable room for improvement. A number of suggestions were made with regard to the sheriff's powers in compulsory hospitalisation.

## **Chapter Twelve: An Evaluation of Higher Governmental Powers**

### **Introduction: Aims and Objectives**

As in the preceding chapter, the general aim of discussion is to use empirically derived data as a complement to more traditional analysis of cases and materials.

The objectives of the chapter are as follows. First, to establish whether the higher governmental powers, viewed as a general category, are contrary to the theory and general principles developed in part one of the thesis. It is submitted that, following on from the method of distinction adopted in chapter nine<sup>1</sup>, they are. Second, to test the practical worth of this evaluation by selecting a representative provision, and subjecting it to detailed analytical and empirical examination: this involves general consideration of the advantages and disadvantages of shrieval adjudication as a decision taking process in this type of appeal. Finally, to summarise the points and arguments made in a brief conclusion.

### **Section One: Higher Governmental Powers and General Principles**

The protasis/apodosis test set out in chapter nine<sup>2</sup> identified higher governmental powers as being those which are more likely to be contrary to the standards of ostensive judicial impartiality<sup>3</sup> and competence<sup>4</sup> than those in the other categories. The discussion in this section seeks to establish the point that the potential for higher governmental powers to be at odds with the standards of secondary morality has been realised. Accordingly, it is necessary to give further consideration to the two inter-related questions which were asked in the preceding chapter, and utilised in the protasis/apodosis test. First, does the extent of the sheriff's formal power under

statute involve a degree of intervention in the political process which is contrary to ostensive judicial impartiality? Second, has the adjudicatory process been allocated tasks which are beyond its functional capabilities, thereby causing an unjustifiably strong polycentric effect? Is ostensive judicial competence affected? For convenience, it is intended to give separate consideration to the issues that are raised.

Before doing so, however, it is recognised that there are obvious dangers inherent in generalising the characteristics of a relatively large number of appeals. It is possible to divide the powers in this group into two sub categories. The first (and by far the largest) is comprised of those powers which allocate to the sheriff a wide power of review; and the second requires sheriffs to find certain states of fact to exist before upholding local authority decisions.<sup>5</sup> However, it is submitted that the appeals share a number of features which make generalised discussion a worthwhile exercise.<sup>6</sup> The most important point to note is that, although the subject matter and grounds of appeal vary widely, sheriffs are required to review the decisions of public authorities on grounds other than legal or jurisdictional concerns: the statutes appear to necessitate a de novo consideration of substantive issues. Furthermore, given that the powers in this category have been selected according to the protasis/apodosis distinction set out in chapter nine, their subject matter involves a higher political content and a stronger polycentric effect than in other appeals requiring the review of substantive merits.

(i) As indicated above, the first point for consideration is whether higher governmental provisions are likely to involve sheriffs in the political process to the extent that their activities could be construed as being contrary to ostensive judicial

impartiality.

The fact that all the decisions in this category are taken in the first instance by elected authorities with a mandate to implement policy is of crucial significance: in the final analysis, if sheriffs are required to review the substance of strongly political decisions, then they are transformed into politicians acting without a mandate. Although this may appear an unnecessarily extreme statement, it is submitted that Himsworth was correct to argue that " ... whatever the historical justification for such supervision [ie of local administration], there cannot now be a case for the creation or continuation of forms of appeal or review which give to the sheriff the power to substitute his view of the merits of a policy decision for that of a local authority."<sup>7</sup> With this point in mind, the question to be answered is whether the extent of shrieval involvement in the political arena required by higher governmental provisions is appropriate. Consideration should be given to a few general examples before forming an opinion and evaluating more specific fieldwork data.

Mention has already been made of the sheriffs' jurisdiction under housing legislation, and the controversy which arose from their exercise of it. The sheriff continues to exercise powers under the Housing (Scotland) Act 1987<sup>8</sup>, which enable him to confirm, vary or quash a local authority closure or demolition order on whatever grounds as may seem just and equitable. The powers of the sheriff were held to be administrative in Thom v. Corporation of Glasgow<sup>9</sup>, although the sheriff reached the rather eccentric conclusion that he was empowered to review the policy and substantive merits as he saw fit, but was excluded from providing jurisdictional review. The ability of the sheriff to review merits and policy was stressed in the more

recent case of McDonald v. Midlothian District Council<sup>10</sup>, which concerned an appeal against a demolition order. In making the order, the local authority had felt that the cottage in question did not meet a tolerable standard (it had an external WC, there was rising damp, and access to the rear door was inadequate): demolition was appropriate in the public interest. The sheriff noted that for the house to be demolished the authority had to be convinced that it "ought to be demolished": it followed that on appeal he too had to be convinced. He proceeded to give an extremely strict interpretation to the statutory grounds, and on visiting the cottage, found it "... not without charm ... there must be hundreds of such cottages up and down the land which are eagerly sought after as holiday cottages".<sup>11</sup> The authority's order was then quashed.

It is argued that it is highly inappropriate for sheriffs to be put in the position of taking decisions of this type. It is for local authorities to decide whether houses are of a tolerable standard. In addition to acting within their statutory remit, their judgements are based on public health and housing policies, and in the final analysis they are answerable to the electorate should they fail to implement them. For a sheriff to reverse a policy based decision of this sort because the property in question had the potential to be a pleasant holiday cottage, and the conditions seemed tolerable enough to him, shows the court in a very poor light.

Decisions of this type must be seen as having a very high political content. The sheriff is not primarily concerned with questions of legality or jurisdiction, but with policy based merits. For a sheriff to overturn a decision means that he has challenged and rejected local authority assessments of fact and policy, substituting

a subjective opinion instead. This is contrary to the general principles set out in chapter two, which require that judges should not be allocated powers which provide for direct involvement in the political process. It may in the long term affect judicial independence in that ostensive judicial impartiality may eventually be questioned.<sup>12</sup> Once it is clear that judges are taking the same kind of decisions as local authorities, then their motives and impartiality may be doubted in public: this is in essence what happened in the 1917 Report on Scottish Housing.<sup>13</sup> As argued above, destabilising secondary morality through ill-considered legislation could eventually have a negative effect on the rule of law.<sup>14</sup> Accordingly, the wide policy based discretion allocated to the sheriff under the 1987 Housing Act must be seen as being inherently inappropriate.

Similar arguments can be advanced concerning the sheriff's powers in connection with school attendance orders. The sheriff is, under s.38 of the Education (S) Act 1980<sup>15</sup>, empowered to take the final decision on appeal to confirm, vary or annul education authority school attendance orders. Prior to the implementation of s.28 of the 1980 Act (which is considered at some length below<sup>16</sup>) attendance order appeals were used as a means of objecting to education authority school placing decisions. Himsworth noted that although in some cases sheriffs had sought to limit their appellate function to legal and jurisdictional considerations, a series of more recent decisions had indicated that sheriffs were willing to consider wider issues with strong policy implications: "Local authority assessments of facts (with inevitable policy overtones) have been challenged by sheriffs in a way which has attracted quite open resentment and anger and which seems difficult to defend in terms of the normal

decision taking competence of the sheriff."<sup>17</sup> In effect, sheriffs were felt to be deciding on the merits of education authority policy in a highly political area, and basing their decisions on premises which were favourable to the parents.

The fact that the legislation involved sheriffs in decision taking which required a considerable "direct political involvement" was made clear by Himsworth in a strongly argued article.<sup>18</sup> His comments also illustrate the point that the provision was, when used for the purpose of appealing against school placing, implicitly at odds with the positivistic ethos of secondary morality and ostensive judicial impartiality: "... Whatever is formally permitted to the court by the ... Act it seems constitutionally improper, and a move which is bound to attract political resentment, if a court appears to assume final responsibility for such matters and especially if, ..., it brings to bear a view of educational policy in the public sector which is at odds with that adopted by the local authority".<sup>19</sup>

As noted in chapter nine, a large proportion of the sheriff's higher governmental functions are held in connection with licensing and registration.<sup>20</sup> These powers raise the same issues. Given that the licensing authorities are comprised of elected members of local authorities<sup>21</sup>, who are empowered to apply policy based discretion to the facts of individual cases, what possible justification can there be for sheriffs retaking their decisions on the same grounds - including policy considerations? Despite the fact that there may be strong implications for the rights of individuals arising out of appeals, sheriffs are effectively invited to ignore the standard of ostensive judicial impartiality.

An example of this type of provision is s.6 of the Nurseries and Childminders



Act 1948<sup>22</sup>, which empowers sheriffs to take the final decision on appeals from local authority orders which refuse, vary or cancel registration for individuals to act as childminders (typically in private nurseries). In the recent case of Roddie v. Strathclyde Regional Council<sup>23</sup>, the tension inherent in the provision became apparent. The authority's Social Work (Child Care) Committee refused the applicant's registration on the grounds that she was not a "fit person" to look after children. She appealed to the sheriff as the decision would have meant the closure of her private nursery. The sheriff's position was a familiar one: "...For the Appellant, ..., [it was] contended that the effect of this section was to give the Sheriff unfettered discretion in the conduct and determination of the appeal. I was ... entitled to hear evidence on the facts, to consider the matter de novo and, if necessary, substitute my own opinion in place of that of the Respondent's sub committee. .... In reply, ... the Respondent contended that the jurisdiction of the sheriff in appeals of this nature was limited to considering whether or not there was any material on which the Respondent's Sub Committee could reasonably have arrived at their decision. That is to say, following the dicta of Lord Greene in Associated Provincial Picture Houses v. The Wednesbury Corporation<sup>24</sup>, that the sheriff ... is only entitled to investigate their actions with a view to seeing [sic] whether they have taken into account any matters of [sic] which they ought not to have taken into account."<sup>25</sup>

After considering precedent, the sheriff concluded that his function was an administrative one, and that he was therefore entitled to take the former rather than the latter course of action.<sup>26</sup> He distinguished Wednesbury<sup>27</sup>, and following Sheriff Macphail's judgement in Carvana v. Glasgow Corporation<sup>28</sup>, felt that he was entitled

to consider all the merits of the case, presumably including policy concerns: "In sum, ..., I have formed the view that the sheriff is entitled, in his administrative capacity, to substitute his own opinion for that of the local authority, if he is satisfied that their decision is quite demonstrably wrong."<sup>29</sup>

The sheriff did, however, show an awareness that the exercise of this discretion potentially involved wider issues, and he was anxious to stress that the "competence of the authority"<sup>30</sup> should be given proper regard. Indeed, he sought to introduce the idea that there was a "presumption"<sup>31</sup> that the authority's decision on the facts (and therefore policy) should be viewed as being correct, unless it can "... demonstrably be rebutted and their decision clearly proved wrong."<sup>32</sup>

This approach can be analysed in the same way as Sheriff Macphail's decision in Carvana.<sup>33</sup> There was an implicit awareness that the sheriff's function may intrude on local authority policy evaluation, and that this was, in general terms, undesirable. However, as was noted above<sup>34</sup>, not all sheriffs (or indeed the Court of Session) can be relied upon to produce such "benevolent"<sup>35</sup> judgements. With this point in mind, and in accordance with the general principles adopted earlier, it is argued that it is unsatisfactory for legislation to invite sheriffs to exercise powers which require "direct political involvement".

In criticising the wide, discretionary remit held by sheriffs in these examples, it is not being suggested that Parliament should never provide for appeals to the sheriff against the decisions of local authorities. There may be very good reasons for doing so: the desirability of "external" review to ensure fair procedure and decision taking for individuals, or questions of cost and accessibility. However, as argued in

chapter two, the legislature should always as a general principle seek to uphold the ethos of secondary morality<sup>36</sup> - the ideal that the legal order should be separated from political debate, and that the standard of ostensive judicial impartiality should be preserved. It is submitted that it has demonstrably failed to do so in so far as higher governmental powers are concerned.

(ii) The second inter-related issue for consideration is whether higher governmental powers involve adjudication in areas of decision taking which are likely to have strong polycentric implications. Is ostensive judicial competence put at risk? It is argued that it is, and that adjudication should therefore be seen as being an inappropriate decision taking process. Himsworth correctly considered the polycentric considerations involved in this type of case to be one of the main arguments against an "extended" (ie higher governmental) role for the sheriff.<sup>37</sup> He argued that the "sheriff cannot escape his adjudicatory style and his limits deny him, as they would any judge, the capacity to handle some types of decision which can at present come his way."<sup>38</sup> It is also worth noting his comment that the "further one gets... from what are strictly questions of law into the evaluation of what is more broadly reasonable or desirable in terms of policy, the more difficult it is for a process of adjudication to accommodate the polycentric issues".<sup>39</sup>

The examples noted above illustrate the argument well. The polycentric effect of shrieval decisions on local authority policy is clear. The sheriff's decision in McDonald v. Midlothian District Council<sup>40</sup> would clearly cause concern for the authority if it wished to make demolition orders for other properties with outside lavatories, rising damp and inadequate access. It would have to consider whether,

in a subsequent appeal, a court would feel bound to follow the McDonald decision - might it be felt that an allegedly sub-standard property could also have the potential to be a pleasant week-end cottage? In short, the polycentric effect of the sheriff's decision is significant. It establishes the point that, in the final analysis, it is sheriffs who decide what a "tolerable" standard of housing is, rather than the local authority. The inevitable result of this is a lack of certainty, and the possibility that local authority policy implementation could be thwarted.

The McDonald decision also illustrates the point that the court lacks the functional capacity to evaluate questions of this nature thoroughly. It was hampered by its concentration on the instant case from making a full evaluation of broader issues such as housing standards. Accordingly, it can be argued in more general terms that because shrieval adjudication takes little account of the wider picture - the policy context in which instant decisions are reached<sup>41</sup> - it is likely to have doubly unpredictable results for local authority planning and decision taking. Uncertainty of this sort, however indirectly, thwarts the main purpose of the rule of law.<sup>42</sup>

It is worth noting briefly that s.6 of the Nurseries and Childminders Act 1948, which formed the grounds of appeal to the sheriff in Roddie<sup>43</sup> has recently been criticised in the 1990-91 Annual Report of the Council on Tribunals.<sup>44</sup> The proceedings before the sheriff were felt to be "unduly time consuming and legalistic" - in itself an indication that the standard of ostensive judicial competence is not being met.

(iii) To conclude this section, it is argued that, in general terms, higher governmental powers do seem to involve sheriffs in the political process to an

undesirable extent: similarly, the polycentric effect of shrieval decisions is unjustifiable. Accordingly, they may be viewed as being contrary to the standards of ostensive judicial impartiality and competence, and therefore at odds with the wider general principles and rule of law theory adopted in part one.

However, this contention should be tested further using empirically derived material. The best example of a current higher governmental provision is the sheriff's power to review local authority decisions on parental choice of school under s.28 of the Education (Scotland) Act 1980.<sup>45</sup> Accordingly, parental choice was made the subject of a fieldwork exercise, the results of which are set out below.

## **Section Two: Appeals under the Education (Scotland) Act 1980<sup>46</sup>**

### **(i) Introduction and Research Aims**

As indicated above, the purpose of this section is to test the theoretical evaluation that higher governmental powers are constitutionally anomalous by using a detailed empirical example. More generally, it is hoped to add to the comprehensive survey of parental choice of school carried out by Adler, Petch and Tweedie.<sup>47</sup> Analytical and empirical materials are combined to build up a better appreciation of the difficulties which arise in practice when higher governmental powers are exercised by the sheriff.

### **(ii) Research Methodology**

Two Regional Council Education Authorities were selected for empirical examination on the basis that the majority of parental choice applications had been

brought against their decisions. They are referred to as R.C."A" and R.C."B". The two senior regional council solicitors who represented the authorities were then interviewed: they are identified as R.S. "A" and R.S. "B". Senior education authority officials were also approached, as were the conveners of the two education committees. Unfortunately, all but one - (education authority official "A" (E.A.O "A" from R.C. "A") - refused to participate.<sup>48</sup> A senior official of the Scottish Consumers Council (S.C.C.) was interviewed: the S.C.C. has a close interest in monitoring the consumer choice made available to parents by education authorities. For logistical reasons, it was not possible to interview a sufficiently representative number of parents. Finally, three sheriffs<sup>49</sup> with some experience of school placing appeals were interviewed (Sheriffs "A", "B" and "C"): others were approached, but declined to take part. As before, the anonymity of interviewees was guaranteed.

### **(iii) Background to Parental Choice of School**

As was noted in section one and preceding chapters, sheriffs have exercised a statutory jurisdiction in education for over a century.<sup>50</sup> Their main functions were held in connection with enforcing school attendance, which inevitably involved them in disputes over school placing.<sup>51</sup> Although these powers were commented on by Himsworth and others<sup>52</sup>, it was section 28 of the Education (Scotland) Act 1980 (as inserted by s.1 of the Education (Scotland) Act 1981) which gave sheriffs a new and rather more prominent role in school placing appeals.

Adler, Petch and Tweedie give a detailed account of the political background to the Act's provisions.<sup>53</sup> For reasons of space, it is not intended to set out anything

more than a brief overview of the main points of note.

During the 1970s, Conservative and Labour politicians in England "recognised the symbolic value of supporting a stronger role for parents in school admissions".<sup>54</sup> There was accordingly some degree of political consensus that choice of school was not simply a matter which should be left to the discretion of education authorities, but also involved important parental rights. The championing of individualism in the face of administrative discretion was in accordance with the ideological convictions of the post-1979 Conservative government, and so there was a strong political incentive for change. Nonetheless, primarily for financial reasons, the implementation of parental choice legislation in England was limited throughout the 1980s.<sup>55</sup> In Scotland, however, the experience was to be different. The provision made for school placing requests in the Education (Scotland) Act 1980 (as amended) was very much more doctrinaire than in England<sup>56</sup>, despite the fact that there was little obvious demand for increased parental choice north of the border.<sup>57</sup> In addition, the parental choice legislation in Scotland became a party political issue. Not only did it have a high ideological and social policy content, but it must also be viewed in the context of the strained relationship between a Conservative Scottish Office and Labour controlled education authorities.<sup>58</sup>

However, these political factors have no direct bearing on the question of whether or not the sheriff should be involved in the decision taking process. Indeed, there is a very strong argument to the effect that shrieval adjudication should have a role. Given that choice of school involves important questions of parental rights - the ability of parents to influence where their children are educated - it is not



unreasonable to suggest that adjudication in the local sheriff court might have an important part to play in parental choice legislation.<sup>59</sup> However, the fact that there are strong political considerations involved complicates the issue. Although a decision on school placing may have implications for parental rights, it also has the potential for strong "direct political involvement" and a significant polycentric effect on education authority decision taking. School overcrowding, education expenditure and pupil/teacher ratios may all have to be considered.

Again, this should not necessarily be taken to mean that shrieval adjudication has no role. What it does mean, however, is that the legislature should seek to limit the role of the court according to general principles of the sort set out in chapter two<sup>60</sup>: if it fails to do so, then the resulting legislation may prove damaging to the standards of ostensive judicial impartiality and competence. Accordingly, the questions to be considered here are whether the legislation fails to comply with general principles, and, if it does, what effect non compliance has had in practice.

#### **(iv) The Sheriff's Powers under Parental Choice of School Legislation**

The extent of the sheriff's powers under 28 of the Education (Scotland) Act 1980<sup>61</sup> is substantial. Education authorities have a statutory duty to place children in the schools chosen by their parents.<sup>62</sup> However, if the authority is satisfied that one or more specified grounds exist, it may refuse the placing request.<sup>63</sup> The grounds of refusal are that placing a child in a specified school would: "(i) make it necessary for the authority to take an additional teacher into employment; (ii) give rise to significant expenditure on extending or otherwise altering the accommodation at or



facilities provided in connection with the school; (iii) be seriously detrimental to the continuity of the child's education; or (iv) be likely to be seriously detrimental to the order and discipline in the school or the education wellbeing of the pupils there".<sup>64</sup>

In addition, the authority is relieved of its duty if the "education normally provided at the specified school is not suited to the age, ability or aptitude of the child; if the education authority have already required the child to discontinue his attendance at the specified school; if the specified school is a special school, and the child does not have special educational needs requiring the education or special facilities provided by it: and if the specified school is a single sex school and the child is of a different sex from that which is admitted to the school".<sup>65</sup>

If the authority refuses a placing request, the parent has a right of appeal to an Education Appeal Committee.<sup>66</sup> If the appeal committee upholds the education authority's decision, the parent may then appeal to the sheriff for a final decision.<sup>67</sup> The proceedings before the sheriff are, in effect, a de novo hearing. The sheriff is empowered to uphold the education authority's decision (the appeal committee cannot be a party to the hearing) only if he finds that one or more of the specified grounds of appeal exist, and that "in all the circumstances it is appropriate to do so".<sup>68</sup> In all other cases he must refuse to uphold the authority's decision and must order the authority to implement the placing request.<sup>69</sup> Importantly, the Act provides that where a sheriff's judgment is inconsistent with the decision of an education authority's refusals of contemporaneous placing requests for other children who are at the same stage of education, the authority must review these like cases<sup>70</sup>, and the parents have a future right of appeal against the revised decision.

### **(v) Research Findings**

For the sake of convenience, it is intended to give separate attention to the two inter-related questions of whether the sheriff's powers in parental choice legislation are drafted in such a way as to involve an unacceptably close involvement with the political process (ie a challenge to ostensive judicial impartiality), and an unjustifiably strong polycentric effect (ie a challenge to ostensive judicial competence).

(a.) It does not require much imagination to appreciate that the legislature, in limiting the sheriff's discretion to find certain states of fact to exist before upholding a local authority refusal, has pitched sheriffs directly into the political arena.<sup>71</sup> It is very difficult for sheriffs to decide on matters such as whether the placing of a child will require the appointment of another teacher, or the alteration of accommodation or school facilities, without judging the substance of local authority policies.

For example, in G v. Shetland Islands Council<sup>72</sup>, an appeal against the refusal of a school placing request by the council was taken to the sheriff under section 28A. The argument advanced by the education authority was that the specified school was severely overcrowded and that the addition of one more pupil would require extra teachers and significant expenditure. It was argued for the appellant that the legislature had intended each placing request to be considered individually, and that, as the need for more teachers and significant expenditure was already present, the addition of one more pupil could not make any difference. The issue for the sheriff to decide was therefore ultimately whether or not the authority's policies on school overcrowding, pupil/teacher ratio and education expenditure were justified - clearly, an extremely political decision for an independent judge to have to take. In this case,

the sheriff upheld the authority's decision, noting that although the duty of the authority was to each applicant child individually, the request in question would have necessitated the employment of additional teachers and significant expenditure.<sup>73</sup>

A similar approach was taken in D v. Grampian Regional Council<sup>74</sup>, where Sheriff Risk was required to consider whether the admission of one more child to the school roll would be "seriously detrimental" to the educational wellbeing of those at the school. The sheriff appreciated that he was in effect required to uphold the education authority's policy, or replace it with one of his own. He was clearly uneasy about involving the court in such a directly political area, stating "If the respondents acted reasonably in fixing a limit of 240, they are surely entitled to say that they will not go beyond that limit. If 241 is reasonable why not 242? If not 242 why not 243 or 245 or whatever?"<sup>75</sup>

Both Sheriffs "A" and "C" agreed strongly with this approach. Sheriff "A" took the view that "the education authority was entitled to lay down a policy", and that when hearing s.28 applications he had "certainly tried" to "stay out of politics". Sheriff "C" commented that the education authority's policy had to stand unchallenged because policy making in this type of area "was not judges' work." He felt that "questions of educational policy are arrived at by these committees after a lot of discussion and some of the members of these committees are really quite impressive people who have had far more first hand experience of these matters than the sheriff could ever have. If you are going to substitute your own judgment for theirs then you must have a good deal of confidence that you are right and they are wrong".

However, an entirely different approach to the interpretation of s.28 was taken

by sheriffs in Strathclyde. In a leading judgment, Sheriff Principal Dick commented in A.B. v. Strathclyde Regional Council<sup>76</sup> that the "weight the sheriff gave to the evidence before him was entirely a matter for him, and likewise what weight or value he attributed to the education authority's policy or the grounds for their decision."<sup>77</sup>

He then went on to reject the education authority's policy, stating that he appreciated "some of the difficulties which may arise in administration for an education authority from the nature of the grounds of refusal stated in section 28, but the duty specified by section 28 resting on them and arising when a written placing request is made is not met... by seeking to apply an overall numbers criteria [sic] divorced from the request of a particular applicant".<sup>78</sup>

The Sheriff Principal then bluntly refuted the authority's policy argument: "I am not impressed by the equality argument."<sup>79</sup> This approach was followed in Duggan v. Strathclyde Regional Council<sup>80</sup>, and in a number of other cases concerning Strathclyde Regional Council.<sup>81</sup>

Sheriff "B" had followed Sheriff Principal Dick's approach when hearing s.28 applications. In contrast to Sheriffs "A" and "C", he was not impressed by Sheriff Macphail's argument in Carvana.<sup>82</sup> He felt that the political and policy concerns of the authority should not hamper the sheriff's decision taking power: "Well, it [ie the Carvana decision] is a nice line. It does not have much meaning in court." He also commented that he enjoyed hearing education appeals, and liked deciding cases on a personal, pragmatic basis: "... we do from time to time sway into these funny areas. My own personal preference is that I find this kind of childrens' stuff pretty interesting. One comes to it almost as a layman really - bringing what one hopes is

not too jaundiced an eye to bear on the activities of education committees ... I am essentially a "people" person rather than a conceptualist. I like dealing with people and that is why I like dealing with this sort of case, which deals with real questions of what is going on in schools."

Adler *et al* stress that the adoption of a particular approach is of considerable importance to local authorities.<sup>83</sup> They identified the first approach as "school level"<sup>84</sup>, and the second as "single child"<sup>85</sup>: "... where a sheriff adopts the school level approach the education authority can be reasonably confident that, if it can justify the imposition of admission limits, it will be able to enforce them. However, where the sheriff adopts a single child approach the authority can have no such confidence and, although it may still wish to impose admission limits in appropriate cases, it cannot expect to be able to enforce them."<sup>86</sup>

The distinction between "school level" and "single child" can be approached in the context of the secondary morality model.<sup>87</sup> Those taking the "school level" approach may perhaps be characterised as being more aware of the potential danger of judges being seen to impose subjective policy choices on elected public authorities - the possible loss of the perception that sheriffs are impartial because of overt involvement in local authority policy. It is contended that their approach corresponds more closely with the general principles suggested for judges in "hard cases"<sup>88</sup> than that of the "single child" sheriffs. Where the legislature has failed to give a clear indication of the limit of judicial discretion they have sought to utilise the mechanisms of secondary morality (ie "benevolent"<sup>89</sup> statutory interpretation and use of precedent) to protect the ethos of secondary morality and the standard of ostensive judicial

impartiality. In this context, this meant permitting the education authority to present policy considerations as factors to be taken into account in decision taking, even although this does not appear as a statutory ground. As a result, "school level" sheriffs are spared from having to take direct policy decisions.

Conversely, those who have taken the "single child" approach have a rather different idea of when the ethos of secondary morality and the standard of ostensive judicial impartiality is endangered by the exercise of discretionary decision taking powers. "Benevolent"<sup>90</sup> interpretation was felt neither necessary nor possible. For example, in contrast with Sheriffs "A" and "C", Sheriff "B" did not feel that the policy content of his decision was something which should weigh particularly heavily with him. He did recognise that there were some areas of shrieval discretion in "this kind of field" where "it could be argued that we are straying out of our remit", but he did not feel that school placing appeals fell into this category. He acknowledged that there could be controversy arising out of a decision which reversed education authority policy, but argued that "our decisions are often controversial in the sense that they arouse hostility in whoever loses - whether that it is in administrative law or criminal law is neither here nor there."

It is therefore hardly surprising that he was relatively unconcerned by suggestions that the "single child" approach involved the direct determination of issues which might not be thought of as "judges' work". His approach was straightforward and untroubled by more abstract concerns: "we are doing what the Act says, even although what we are doing in accordance with the Act is inevitably going to have consequences which may be political."

(b.) The second inter-related issue for discussion is whether the legislature created powers which have an unjustifiably strong polycentric effect. Is ostensive judicial competence breached, and, if so, has this had an undesirable effect in practice?

It is argued that Himsworth was entirely correct to characterise the sheriff's powers in school placing appeals as being "archetypical examples of Fuller's polycentric decisions."<sup>91</sup> It is not difficult to see how he reached this conclusion. To take one example, a decision concerning overcrowding may affect not only the child in the instant case, but any number of children in a similar position simply by virtue of the fact that it is a court decision.<sup>92</sup> Accordingly E.A.O. "A" commented that in every appeal there were "... serious policy implications for the authority - not just in the individual case but in terms of the generality of cases - the law really requires us to square the circle". He went on to state that, "a bad decision can result in the overturning of perfectly well-founded policies - at the end of the day we have to justify our individual decisions on policy and if that is replaced by nothing then I do not see how we can operate. The legislation is absolutely incredible as it stands. It means that you cannot plan."

However, it should be noted that although the requirement to review all like decisions<sup>93</sup> might on first inspection be expected to magnify this polycentric effect, its importance is restricted in practice. Both authorities felt able to take a narrow interpretation of the shrieval decisions, and reviews were seldom successful for parents. R.S."B" noted that, "... we had to review all like decisions, but usually we still go against the parents - it is comparatively rare for us to find for parents on review." Notwithstanding this, it is clear from E.A.O. "A"'s comments that the strong



polycentric effect of shrieval decisions cannot be denied.

The next point to be considered is whether or not the potential for polycentric effect causes problems in practice. That it has is clear from the distinction between sheriffs taking the "school line" and "single child" approaches.

The "school line" interpretation reflects awareness on the part of sheriffs that their decisions can have a profound polycentric effect, and a consequent unwillingness to become involved in substantive issues. In G. v. Shetland Islands Council<sup>94</sup>, the sheriff noted in his decision that if an individual approach was taken, "it would have the absurd result, surely not intended by the legislature, of compelling education authorities to accept requests for placing in understaffed and overcrowded schools."<sup>95</sup> Similarly, in D v. Grampian Regional Council<sup>96</sup>, Sheriff Risk stated that, "The effect of the gradualist approach would be to require the court to fix the limit, or declare that there is no limit, a task which it is manifestly less suited to perform than the education authority."<sup>97</sup>

These arguments were supported by Sheriff "A", who was convinced that the court was not functionally equipped to consider policy issues, and that it was unable to evaluate the polycentric effect of a decision. He appreciated that the focus of court proceedings onto the facts and circumstances of individual cases meant that broader issues could not be considered properly: "... a policy is not something which is capable of elucidation by evidence - I am inclined to the view that the function of the court is not to determine policies at all."

However, the approach of the "single child" sheriffs was very different. They refused to consider the polycentric effect of their decisions. Under their interpretation,



the policy implications of decisions were irrelevant, and the only concern of the court was the facts of the instant case. For example, in Y v. Strathclyde Regional Council<sup>98</sup>, Sheriff McNeill noted that, "It was argued that in the event of me allowing an appeal the education authority would review the other unsuccessful cases and would of necessity decide them in the same way. Accordingly a question of one child would be converted into a question of several children coming to the school at the one time. In my view this contention is unsound. I can only consider the appeal which is before me. I know nothing of the circumstances of other requests."<sup>99</sup>

Sheriff "B" echoed the view that the wider considerations were completely excluded, stating that, "the regional council was on a hiding to nothing - the legislation was such that if one more child was able to go into a classroom the whole thing would collapse in a heap: there was no way in which they could prove their case".

Very clearly, the polycentric element of these cases has caused significant difficulties. "School line" sheriffs are concerned about the possible policy implications of their decisions. Conversely, in cases which are heard by "single child" sheriffs, the polycentric effect of court decisions causes serious problems for the education authority. Either way, it is argued that the degree of polycentricity is such that it cannot be justified: parental choice of school appeals taken on the grounds set out in s.28 are unsuitable for resolution by adjudication. The standard of ostensive judicial competence is therefore breached in school placing appeals.

(c.) As a final point, however, it should be noted that it would be misleading to claim that considerations of political content and polycentric effect were all that had

influenced sheriffs in the adoption of the "school level" and "single child" approaches. The fieldwork evidence relating to the practical operation of the adjudicatory process lends support to MacCormick's reminder that the way in which a judge exercises discretion in "hard" cases is heavily influenced by the nature and quality of the legal arguments presented to him in court.<sup>100</sup> Indeed, Sheriff "C" commented that "one does rely very much on parties presenting their evidence and efficient cross-examination. It is not always easy to know what questions to ask. The quality of a judgment depends enormously on the quality of the people before you, what they chose to present and how they choose to conduct their case."

Cases in Regional Council "A"'s sheriffdom were decided on the basis of the "school level" approach. It was noticeable that the E.A.O. and the R.S. liaised very closely and had a good working relationship: indeed, they insisted on being interviewed together. The Regional Council had taken a close interest in the legislation from an early stage, and had been in no doubt of its potential impact on the authority's policy. Most significantly, R.S. "A" had devised a litigation strategy, which was designed to minimise the damage to the authority's policy: "We consciously and deliberately recognised the potential outcome of these cases - they could have had considerable policy implications - so we used counsel<sup>101</sup> right from the beginning. We quite deliberately wheeled out the big guns."

In addition, the R.S. refused to be pressurised by parents into early hearings in order to prevent the authority from being "railroaded". Taking full advantage of the summary applications procedure<sup>102</sup> gave more time for case preparation. Rather more subtly, the authority's counsel also sought to make use of the ground that the

admission of another child to a school would "be likely to be seriously detrimental to educational wellbeing"<sup>103</sup> rather than attempting to argue that it would definitely require significant expenditure or the employment of more staff<sup>104</sup>; the test for educational wellbeing is not certainty but likelihood. This was felt to give more room for manoeuvre<sup>105</sup> when leading education authority expert witnesses.<sup>106</sup>

Regional Council "B", however, had its decisions turned down by sheriffs taking the "single child" approach. At the time of interview, it was still in the process of developing closer links between the education authority and the regional solicitor's office: it seemed that the relationship had not been as effective as it might have been. R.S. "B" indicated that the education authority had not recognised the implications of the legislation. He also felt that the authority had not given sufficient thought to the question of what to present as evidence: "the education authority was not initially geared up to deal with the hearings - we had a devil of a job producing evidence." Unlike Regional Council "A", Regional Council "B" did not seem to have attempted to rely on legal grounds which might have been more favourable to the authority. Indeed, R.S. "B" took the view that the Act effectively prevented the possibility of leading policy evidence: "the basic principle of the Act is that everything is handled on an individual cases basis - the sheriff is bound by the legislation to look at each individual school and to see if there is the possibility of squeezing in another child. It is usually very difficult to say that a school is so full that it cannot take another child."

It would also seem that Regional Council "B" had allowed itself to be pressurised by the parents' solicitors into early hearings, thereby making it more

difficult to prepare adequately. R.S. "B" commented that the timing of hearings had been "very hectic", and that he had once had to appear in five different cases in eleven days.

(vi) To conclude this section, it might well be the case that the differences in approach taken by the two authorities and their legal experts go some way to explaining the differences in approach taken by sheriffs. Indeed, R.S. "A" felt that R.C. "B" had brought the "single child" approach upon itself because of "a lack of detailed preparation". However, no matter which approach has been adopted, it seems clear that the ultimate cause of the confusion for sheriffs, authorities and parents was the difficulty arising from the legislature's creation of a wide statutory discretion, which requires a strong "direct political involvement" and causes a significant polycentric effect - in short, legislation which strikes at the standards of ostensive judicial impartiality and competence.

The resultant confusion has meant that sheriffs are unable to agree on the nature and extent of their discretionary powers, and that different sheriffdoms enforce completely different interpretations of the Act. This means that parents who would expect to win placing appeals in one sheriffdom, would in all probability lose in another. Similarly, Regional Council "B" has had to face the polycentric implications of having its policies reversed, whilst Regional Council "A" has been able to avoid any such dislocation. It is not surprising that Sheriff "C" described the overall situation as being "hopeless".

The significance of these developments is that they lend support to the contention that the general principles developed in chapter two do indeed have a wider

practical relevance.

### **Section Three: Summary and Conclusion**

Section two of the chapter illustrates very clearly that the general arguments presented in section one are borne out by empirical evidence: higher governmental powers may therefore be viewed as being contrary to general principles and wider rule of law theory and therefore inherently inappropriate for allocation to sheriffs.

Legislation which requires sheriffs to exercise a wide, discretionary power of review over the political decision taking of elected local authorities causes difficulties for both the sheriffs and the authorities concerned: the standard of ostensive judicial impartiality is breached, and this has practical as well as theoretical consequences. It also gives rise to an unacceptably high polycentric effect, which, far from being a storm in an academic tea-cup, was shown in section two to have a real and negative effect on both the integrity of adjudication and the authorities concerned. The importance of maintaining certainty in adjudicatory decision taking through the maintenance of the standard of ostensive judicial competence is clearly illustrated.

The confusion which results from the legislature failing to uphold the standards of ostensive judicial impartiality and competence is therefore not only contrary to the ideal of the rule of law, but is also highly problematical in practical terms.

## **Chapter Thirteen: An Evaluation of the Sheriff as Civil Judge**

### **Introduction: Aims and Objectives**

The aim of this chapter is to evaluate the next category of shrieval powers in local administration - the sheriff as a civil judge<sup>1</sup> - according to the general principles and theoretical standards developed above. As before, extensive use is made of empirical material to test whether the evaluation has any practical significance, and to examine how shrieval adjudication operates in practice.

The chapter is structured as follows. Section one gives consideration to the question of how the general category of civil judicial powers should be evaluated in the light of its theoretical context. It is argued that civil judicial powers correspond with the general principles which have been adopted.<sup>2</sup> Section two takes the discussion further. The results of an extensive fieldwork exercise which looked in detail at the operation of a representative power are given close consideration. The resulting combination of analytical and empirical material confirms and illustrates the more general argument advanced in section one and highlights the strengths and weaknesses of shrieval adjudication as a decision taking process in this area. The final section draws together the main themes in a brief conclusion.

### **Section One: Civil Judicial Powers and General Principles**

Evaluating this category of powers involves using the same test of justiciability that was set out in chapters eleven and twelve.<sup>3</sup> Do the sheriff's powers under statute involve a degree of "direct political involvement"<sup>4</sup> which may be said to be in conflict with the standard of ostensive judicial impartiality?<sup>5</sup> Has adjudication been allocated

to functions which could have a strong polycentric effect<sup>6</sup>, thereby challenging the standard of ostensive judicial competence?<sup>7</sup>

The nature of the civil judicial powers was established in chapter nine: a list of powers which might reasonably be said to fall into the category was also suggested.<sup>8</sup> It was recognised that the list should not be viewed as final and rigid, as there will always be doubt over the inclusion of some of the functions. The system of allocation which was used - the protasis / apodosis model<sup>9</sup> - is a general one, and it is a feature of "broad-brush" allocation of this type that there will always be scope for disagreement.

However, despite the wide ranging nature of the subject matter, it is possible to identify the main features of the civil judicial category.<sup>10</sup> First, the sheriff's appellate powers focus on individual rights, in areas in which the judiciary has traditionally exercised a wide discretion. Accordingly, it is contended that, although the appeals may be political in the limited sense that they involve review of the merits of public authority decisions, the degree and nature of the intervention is such that there is no likelihood of destabilisation of the standard of ostensive impartiality. There is a general recognition that the issues involved are such that they require the participation of an ostensibly impartial judicial figure to weigh and decide questions of fact and law, and there is no real potential for a clash over the question of whether or not sheriffs should feel limited in their review of merits: the issues under consideration are not directly political. The second closely inter-related contention is that the polycentric effect of shrieval decisions is limited to an acceptable degree.<sup>11</sup> The local authority and the appellant are essentially participants in a normal civil case.



Although there may be some polycentric implications for an authority arising out of a decision, appeals are very much more individualised than, for example, school placing appeals, in that they do not directly concern policy. Accordingly, ostensive judicial competence is not challenged.

These points are best illustrated by example. There are a number of provisions in which sheriffs perform functions which are traditionally thought of as being suitable for resolution by judicial adjudication in areas such as compensation. However, the most interesting examples of civil judicial powers are to be found in comparatively recent legislation.

Under the Representation of the People Act 1983<sup>12</sup>, sheriffs are empowered to hear appeals from the decisions of Electoral Registration Officers.<sup>13</sup> There is an appeal on a point of law from the sheriff to three judges of the Court of Session.<sup>14</sup> The subject matter of the provision is clearly an area which can be described as being highly political. Indeed, in Dumble v. Electoral Officer for Borders<sup>15</sup>, the right of appeal was used as a means of challenging the bona fides of a Conservative party candidate.<sup>16</sup> However, it is clear that the sheriff's ostensive impartiality and the safeguards afforded by adjudication<sup>17</sup> are central features of the appeal process. He is not reviewing the merits of a local authority decision which might be said to have been based on policy, but that of a public official who is empowered to carry out a well defined statutory function.<sup>18</sup> The possibility of a strong exercise of discretion is further limited by relatively strict legislative drafting, precedent and the possibility of appeal. Ostensive judicial impartiality is not challenged. In addition, any polycentric effect which shrieval decisions might have is restricted, as the facts tend



to differ from case to case and there are no direct implications for government or local authority policy. The standard of ostensive judicial competence is therefore upheld.

For example, in Moore v. Electoral Registration Officer for Borders<sup>19</sup>, an appeal was taken to the sheriff from the decision of the E.R.O. by a student who wished to be treated as an absent voter. The E.R.O. had based his decision on the unreported case of Baird v. Electoral Registration Officer for Ayrshire<sup>20</sup>: his decision was primarily one of law and fact, rather than the weighing of policy considerations. In reaching decision, the sheriff principal was able to refer not only to the relatively restrictive terms of the statute and the Baird case, but also a series of decisions of the registration appeal court.<sup>21</sup> The implications of the decision cannot be said to be unacceptably polycentric in that, although it affects those who find themselves in the same situation as the appellant, it does not have a direct or significant effect on policy.

The sheriff's functions under the Race Relations Act 1976<sup>22</sup> and the Sex Discrimination Act 1975<sup>23</sup> also serve as good examples of civil judicial powers. Both Acts empower the sheriff to take decisions which may restrain members of the public from persistent discrimination, and to determine whether a wide range of discriminatory practices have occurred outwith the field of employment.<sup>24</sup> The responsibility for bringing the applications lies with the Commission for Racial Equality and the Equal Opportunities Commission respectively.

As in the electoral law jurisdiction, the subject matter of the applications is both political and potentially controversial. The decision of the Court of Appeal in

the English case of Mandla v. Dowell Lee<sup>25</sup>, and its subsequent rejection by Lord Fraser of Tullybelton in the House of Lords, is a clear illustration of the sort of difficulties which can arise if judges fail to meet the standards of ostensive impartiality and competence. However, the sheriff's role is not to make a wide discretionary review of the merits of an elected authority's decision in a directly political area: both the C.R.E. and E.O.C. are statutorily appointed bodies and their functions are set out by Act of Parliament.<sup>26</sup> The ostensive impartiality of the court is used as a means of upholding the rights of those who are alleged to have contravened the legislation as well as the person who claims to have been discriminated against.<sup>27</sup> The sheriff is empowered to adjudicate in disputes which are focused on the question of how to interpret the law in an instant case in order to delineate statutory rights. He is effectively limited by a system of rules (both statutory and common law<sup>28</sup>) to considerations which have traditionally been viewed as being within the special remit of the court and adjudication - questions of individual rights. Ostensive judicial impartiality is not challenged.

There is obviously the potential for decisions on discrimination to have a considerable effect on individuals beyond those who are immediately involved in instant cases. However, it is again argued that the polycentric effect of decisions should be viewed in the context of the effect that other types of civil court decisions can have in questions of statutory right: although the implications of decisions may be far reaching, they cannot be viewed as being unacceptably polycentric<sup>29</sup> or contrary to ostensive judicial competence, as their focus is not the substantive merits of an elected authority's policy.

Another more recent example of a civil judicial power can be found in community charge legislation. In many respects, the sheriff's powers are not dissimilar to those held in electoral law. Under the Abolition of Domestic Rates (Scotland) Act 1987<sup>30</sup>, sheriffs were required to hear appeals from the decisions of Community Charge Registration Officers. Some of these appeals were, given the highly charged nature of the community charge debate, in the nature of political test cases.<sup>31</sup> All were widely reported by the media. The legislation implicitly provides that sheriffs are empowered to consider the merits of each application, in addition to legal and jurisdictional concerns.<sup>32</sup> The sheriff's decision is final, other than for appeal to the Court of Session on a point of law.<sup>33</sup>

A considerable amount of debate arose when sheriffs chose to interpret their powers in a restrictive fashion: in effect, it was held that the decisions of registration officers could only be reviewed on jurisdictional grounds.<sup>34</sup> The reason for this approach may well have been concern on the part of sheriffs that, if they had done otherwise, some of the political opposition to the tax might have been focused on the Sheriff Court. Although this is an entirely conjectural suggestion, it may have been felt that their ostensive impartiality and therefore independence could be damaged if they were seen as being responsible for taking "on the merits" decisions to remedy the individual injustices caused by what was perceived by many to be a profoundly iniquitous and badly drafted statute.

In a series of joint articles<sup>35</sup>, Reid, Scobbie and Barker criticised sheriffs sharply for not exercising a wide discretion. Commenting that there was "... nothing in the legislation to suggest that the role of the sheriff should be limited to reviewing

the registration officer's decision, nothing to suggest that the sheriff should not be prepared to allow an appeal simply because he disagrees with the registration officer's decision"<sup>36</sup>, they argued that in "... adopting a restricted approach to their task the sheriffs are denying individuals their one opportunity for a full and independent appeal against the imposition of a tax." Sheriffs were, it was claimed, responsible for ensuring that "... the imposition of the community charge will lie too much at the discretion of officials and defeats the appeal mechanism provided by Parliament."<sup>37</sup>

On balance, Reid et al are correct to take this view. Although he is a regional council official, the position of the registration officer is not comparable with, for example, that of an education authority deciding on a school placing request. He is not concerned with policy issues: like the Electoral Registration Officer, his remit is essentially one of deciding on fact and law in individual cases.<sup>38</sup> An appeal to the sheriff cannot therefore be seen as contrary to the general principle that the judiciary should not be allocated functions which involve direct consideration of the merits of policy based decisions made by elected authorities. Similarly, as Reid et al point out, the provision<sup>39</sup> has as its main object the protection of individual rights: the ostensive impartiality of the sheriff and the procedural protection of adjudication may therefore be seen as being appropriate. As in the other examples noted above, the polycentric effect of shrieval decisions is limited to an acceptable level. Although decisions may have important implications for the individuals involved in the applications and those in similar situations, they should not be viewed as being strongly polycentric or contrary to ostensive judicial competence in that any effect on regional council policy is indirect.

Without disagreeing with the conclusions of Reid et al (which were subsequently supported by the Court of Session<sup>40</sup>), it may be argued that they were not sufficiently sympathetic to the position of the sheriffs involved. Taking strongly discretionary decisions in highly controversial political areas is an extremely daunting prospect for any judge, as it pushes them into an area of decision taking which may potentially give rise to justifiable concern for the standards of ostensive impartiality and competence. In the community charge cases, the sheriffs clearly erred on the side of caution, but it is important to be aware of the difficult context in which they made their decisions.

## **Section Two: Appeals under the Social Work (Scotland) Act 1968<sup>41</sup>**

### **(i) Introduction and Research Aims**

The most effective way of exploring the general themes of the previous section is to use empirically derived material. Following the pattern of previous chapters, a representative power has been selected for detailed investigation. The provision which was chosen was s.16 of the Social Work (Scotland) Act 1968. Although there are comparatively few applications each year, and the numbers are steadily decreasing<sup>42</sup>, it is nonetheless an important sheriff court function. The subject matter of the provision - the assumption of parental rights by a Regional or Islands council - is extremely weighty, and involves highly contentious and difficult decisions. Section 16 has also been at the centre of a considerable degree of controversy and debate, and was heavily criticised in the Child Care Law Review which was produced by the Social Work Services Group after my research was carried out.<sup>43</sup> Hopefully, my

findings will contribute to this wider discussion.

As indicated above, the purpose of this section is to test the evaluation of civil judicial powers as being broadly in accordance with the general principles for legislation and theory of secondary morality.<sup>44</sup> More generally, it is intended to identify areas of concern in the operation of the adjudicatory process: these are clearly of relevance in any attempt to evaluate the suitability of court based adjudication in an area such as child care law. As in the preceding chapters, analytical and empirical research is combined to promote a more complete understanding of the provision, how it works in practice, and its wider context.

### **(ii) Research Methodology**

Three regional councils (RCs "A", "B", and "C") were selected for participation on the basis of a survey of reported and unreported decisions, and senior social workers (SWs "A", "B", and "C") and regional solicitors (RSs "A", "B", and "C") were interviewed from each authority. Five sheriffs were approached, but only three were able to participate (Sheriffs "A", "B", and "C"). The views of children could not be canvassed.<sup>45</sup> Accordingly, representatives of the Scottish Child Law Centre (SCLC) and Who Cares? Scotland (WCS) were interviewed. As before, the interviews were semi-structured, and anonymity was guaranteed.

### **(iii) The Sheriff's Powers Under s.16 of the Social Work (Scotland) Act 1968**

Regional and Islands councils are able to assume full parental rights and powers over children under s.16 of the Social Work (Scotland) Act 1968.<sup>46</sup>

Subsections (1) and (2) set out the grounds which the local authority must make out before parental rights can be assumed. The authority can base the resolution on the ground that the child has been in care for a period of three years.<sup>47</sup> If the parents are still alive, a written notice must be served informing them of the authority's intention and of their right to "appeal" against the resolution.<sup>48</sup> The authority may assume parental rights in respect of one or both of the parents. If the parents wish to oppose the resolution, they are required to serve a written counter-notice within one month of the authority's notice being served.<sup>49</sup> If the authority does not make an application to the sheriff within fourteen days of the counter-notice, then the resolution must lapse.<sup>50</sup> However, if an objection to the application is made to the sheriff, the resolution remains in force until the sheriff has decided whether to uphold or quash it.

The sheriff must be satisfied that the following grounds have been made out before upholding the authority's resolution:

- (a) that it is in the best interests of the child<sup>51</sup>,
- (b) that the grounds on which the resolution was passed were made out at the time of the resolution<sup>52</sup>, and
- (c) that at the time of the hearing there continue to be grounds which could justify a resolution.<sup>53</sup>

#### **(iv) Research Findings**

These are set out as follows. First, consideration is given to the inter-related issues of whether the sheriff's powers under s.16 involve an unjustifiable degree of



involvement in directly political areas (therefore challenging ostensive judicial impartiality<sup>54</sup>), and whether shrieval decisions cause a strong polycentric effect (therefore challenging ostensive judicial competence<sup>55</sup>). Second, a number of problems and concerns are identified in the way in which the decision taking process operates in practice.

(1.) Discussion of the first point is facilitated by the fact that the Court of Session has given indirect consideration to the nature of the sheriff's function under s.16. In Central Regional Council v. B.<sup>56</sup>, an Extra Division of the Court of Session was called upon to consider the question of whether a right of appeal existed from the sheriff to the Court of Session. The Act makes no provision for appeal, so the court was required to decide whether one could be implied. The argument which was put before the court by counsel for the respondent was that: "the sheriff's function was partly administrative review and partly judicial. If it had been intended that there should be an appeal from the sheriff's decision, it would have been encompassed within the framework of the Act."<sup>57</sup>

Lord Brand was dismissive of this argument (as were Lords Robertson and Stewart). He quoted approvingly from Lord President Cooper's remarks in the Arcari<sup>58</sup> case, stating that: "in my opinion, the decision of the sheriff under s.16 was, ..."truly a judicial determination of the Court, issuing a judgement within the familiar framework of our system of practice and subject to ordinary methods of review""<sup>59</sup> His conclusion was that such a review had not been excluded by statute and that appeal to the Court of Session was therefore competent.<sup>60</sup>

This type of reasoning implies consideration, albeit inchoate, of the sort of



arguments which have been developed above. It is contended that what lay behind the adoption of Lord President Cooper's test was an appreciation that there was no evaluation of directly political issues involved in reaching a decision. Whilst it is true that the resolution to assume parental rights is made by the regional social work committee (or a sub-committee), and that it is comprised of elected regional councillors<sup>61</sup>, it is also the case that judges have traditionally held overriding powers in cases involving child care and family law. Although family values, child care and issues such as child abuse are highly political in the generic sense, there is no likelihood of the sheriff's position being challenged on the grounds that his powers involve direct intervention in the political affairs of an elected authority. Indeed, ostensive judicial impartiality is a vital element in provisions of this type.

The nature of the issues under consideration is such as to require judicial adjudication. Resolutions involve very weighty decisions on individual rights, and extremely serious consequences for individuals - both parents and children. The polycentric implications of decisions are extremely limited, as both the court and the social work authority operate within a statutorily defined system which is (supposedly) geared towards the protection of individual children and fair treatment for natural parents. It was held by Sheriff (now Lord) Caplan in Lothian Regional Council v. T.<sup>62</sup> that close consideration must be given to the individual circumstances of each case. In the leading case of Lothian Regional Council v. H.<sup>63</sup> it was held that sheriffs must also examine the purpose of the authority's resolution. Reaching a decision clearly involves a weighing of factors, but the polycentric effect is within acceptable boundaries, as the court's "periphery of concern"<sup>64</sup> is focused on

questions of fact and law, rather than policy concerns. Ostensive judicial competence is therefore assured.

That there is a general consensus that the ostensive impartiality of a judge, and the procedural protection of adjudication are necessary to safeguard individuals was made clear by all of the shrieval interviewees. Sheriff "A" commented that, "the provisions in s.16 of the Social Work Act lend themselves to the sort of procedure that we follow in the court, which is a very judicialised procedure. ... it really is akin to any other civil action in the sheriff court .... I would see these cases as being very different from those under, for example, the parents' charter." Sheriffs "B" and "C" held similar views, and Sheriff "C" stated forcefully that in his opinion assumption of parental rights is a "... purely judicial function ... it is a decision affecting the parties - a child-based decision."

The other interviewees concurred with this approach either directly or implicitly. There was a remarkable degree of consensus which was to the effect that shrieval adjudication was suitable in these cases<sup>65</sup>, but that the legislation and sheriff court procedures left much to be desired. How current practice should be altered depended to some extent on the particular interests of the interviewee. For example, the WCS representative commented: "We feel that the court is the place to deal with the assumption of parental rights, but that there should be more of a place for the child's point of view."

(2.) The common theme that sheriff court based adjudication, although the most suitable decision taking process in the assumption of parental rights, has serious deficiencies, is clearly a highly relevant issue for further consideration. Focusing on

the particular problems which are felt to exist increases understanding of the limitations of adjudication. This may in turn encourage the legislature to provide for a more sophisticated utilisation of adjudication in future civil judicial provisions.

The interviewees had three main areas of concern. First, it was felt that the legislation weighed the decision taking process in favour of the local authority to the detriment of parents who wished to challenge the resolution: this limited the value of adjudication. Second, there was concern that the formality and procedure of shrieval adjudication resulted in witnesses failing to do their evidence justice. Parents were felt to be intimidated, and some interviewees claimed to find it difficult to lead wider evidence on general issues (such as social work theory) which may have influenced the decision to assume parental rights. Finally, there were very serious criticisms of the delay inherent in the legal process. These concerns are dealt with in the order that they are listed.

(i) The majority of interviewees felt that the way the legislation is set out means that parental rights can be assumed by a purely administrative process. If the parent chooses not to serve a counter-notice, then parental rights will be assumed without the matter even being brought to the attention of a court. This was felt to be undesirable on principle<sup>66</sup>, as the result of a successful resolution is a profound one for the parent, and also because individual parents are pitted against the resources and expertise of the regional council. The effectiveness of the adjudicatory process is obviously limited ab initio if the assumption procedure discourages parents from forcing a hearing. As noted in the context of the discussion of compulsory hospitalisation, it is always important to view adjudication in its wider context: to

do otherwise creates a distorted, court centred picture of how the process operates.

The representative from the SCLC stated that ".. the concern that we hear voiced is that it is unfair to present an assumption as a fait accompli - an administrative measure .... I think there is a feeling that there is no natural justice - there is no adversarial element. Even social workers feel uncomfortable with this - it should not be done by administrative resolution. The court should be the proper forum in all assumptions."

The social work interviewees agreed with this view. For example, SW "A" commented, "It has to be a court which takes these decisions. They are "one-of" and have tremendous long-term effects for children and parents. There are evidential grounds to satisfy. There has to be a stricter evaluation of the Regional Council's decision."

All the regional solicitor interviewees were also concerned by the gap in the legislation (although RS "A" was concerned by the cost implications of reform). For example, RS "B" felt that the legislation as it stood was unsatisfactory, and commented that "... even though the decision [ie to pass a resolution] is made by a body of people who have advice from numerous experts, it is still a decision of a regional council. I think it is wrong that a regional council should have the power to vest in itself somebody's parental rights without any other person necessarily being required to review that decision."

The shrieval interviewees were similarly unimpressed by the current legislation. Sheriff "A" was very concerned that illiterate or poorly educated parents might be intimidated by the local authority notice, a point which was supported by a number

of other interviewees, in particular the SCLC and WCS representatives. The sheriff made a number of important points: "... assumption of parental rights is a strange and cumbersome procedure .... Putting the burden on the parent makes it difficult for the parent to decide to oppose this massive organisation [ie the regional council] .... it might well be fair to have some sort of mandatory hearing in court before the final decision was taken .... This would mean that a parent who is illiterate or only part literate is able to put some sort of a case before the court."

Presumably because of the general concern that parents were unfairly disadvantaged by the current legislation, the Child Care Law Review recommended that there should be a new Parental Rights Order which an authority would have to secure from a court.<sup>67</sup> The order could only be granted without the permission of the parents if for a stated reason the court decided that the parents' wishes should be disregarded.<sup>68</sup> The Review also recommends that the court should have the power to appoint an independent reporting officer to "witness agreements and ensure that the parent is aware of the implications of consenting to a petition."<sup>69</sup> Proposals of this type go some way towards meeting the criticisms which were made by the interviewees in my fieldwork research. The value and effectiveness of shrieval adjudication will increase if parents are better informed about their rights under assumption procedures. As yet, there has been no change in the legislation. If these proposals are left to gather dust, it will be a matter for serious concern.

(ii) The second issue which was raised by some interviewees was the concern that the formal, adversarial model of adjudication inhibited witnesses from presenting their evidence effectively. Two main points were made.

(a) First, some of the interviewees (particularly social work and interest group interviewees) felt that the formalised procedure and physical environment of the courtroom, together with the criminal law connotations of the sheriff's wig and gown, intimidated parents and children. SW "B" compared parents to "rabbits caught in car headlights". The sheriffs themselves were not unsympathetic to this view. On balance, they felt that judicial garb was appropriate given the serious nature of the proceedings, but that a less formal and more interventionist role might be particularly appropriate in this type of case. For example, Sheriff "A" commented, "I think a sheriff is able to do a great deal more than simply sitting in judgement listening to one side, then listening to the other and then churning out a judgement. It might therefore be much more desirable for the sheriff to take a more fluid approach than at present." Sheriffs "B" and "C" both adopted a similar argument, and were in favour of sheriffs taking a more direct, pro-active role in proceedings. They were also in favour of a less rigid adherence to courtroom formalities.

The regional solicitor interviewees had mixed opinions. RS "B" and "C" were strongly against unnecessary formality. For example, RS "B" commented that "the argument for court formalities is that it impresses upon individuals the majesty and importance of the occasion. I would have thought that any half-decent judge should be able to impress that without dressing up. I don't see any benefits in unnecessary formality. Going to court is sufficiently traumatic .... The more that the witness is going to be able to think properly in a relaxed fashion the better." However, RS "A" took an entirely different view. He argued that sheriffs should use every means at their disposal to ensure that parents and other witnesses did not feel tempted to lie to

the court: "... for a sheriff it is a great assistance to know whether someone is telling the truth .... they should be in awe of their surroundings and even a bit uncomfortable. Being in a physically and psychologically exposed position can be useful. If the decision is such that it will affect the child for the rest of his life, it is important for him [ie the sheriff] to be able to use every means at his disposal to find out what actually happened. If that involves making the parent almost feel like a criminal, they are not in that regard any different from someone who is being sued for debt".

It is argued that RS "A's views are extreme and untenable. As RS "B" indicated, experienced judges should be able to ensure that parents and other witnesses are sufficiently aware of the serious nature of proceedings without reverting to theatrical behaviour which, in the final analysis, is intended to intimidate. Parents should not feel that they are being criminalised<sup>70</sup>: although their conduct may well have been unacceptable, it is not criminal conduct. A more sensible balance between creating comparatively informal and relaxed surroundings and maintaining the gravity of the proceedings should be arrived at. Hopefully, as well as decriminalising the experience for parents, the quality of their evidence could be improved. The shrieval interviewees agreed with this, but it is indeed strange that, despite their thoughtful and sympathetic ideas on how to reduce stress for parents and other witnesses, they appeared to be convinced that it was of some importance that they should sport a rather comical eighteenth century periwig during hearings.

There was also concern on the part of some interviewees that current procedures prevent the children involved from making their views known to the court, and there was a considerable degree of debate on the wider question of whether the



legislation is sufficiently "child centred". It would, however, be a mistake to become involved in a discussion of child care theory and the merits or demerits of the legislation itself, as issues of this nature are not within the remit of this thesis. Nonetheless, attention should be given to a few basic points.

The WCS representative argued strongly that children over the age of twelve are quite capable of forming strong views as to whether or not they should stay with parents, and that the current system fails to take their opinions into account. Little attempt is made to inform, or explain what is happening to, the children. Not only is the whole idea of assumption of parental rights difficult for a child to understand, but the court itself is highly intimidating: "... children often do not know what the whole thing is about ... appearing in court as a child is really frightening .... it is very intimidating standing up in the court .... the parent is also there and the child may not want to say things because of that".

With these points in mind, some interviewees felt that more sheriffs should be encouraged to take it upon themselves to speak to children privately, particularly in cases involving older children. Any discussion would have to be non-threatening (ie in chambers and without judicial garb). It is argued that this type of approach might prove helpful<sup>71</sup>, although it would not necessarily have much bearing on the sheriff's final decision.

Another proposal which was made was that the court should make more use of independent reporters<sup>72</sup> (similar to curators ad litem) to represent the interests of children. This proposal was mainly supported by the non-legal interviewees. The majority of legal interviewees (excluding the SCLC) were unenthusiastic if not hostile



to the idea. It was felt that there would be confusion over the role of reporters, of the sort which arose in the recent case of Kennedy v. M.<sup>73</sup> Both sheriffs and regional solicitors felt that the role of reporters was superfluous if the examination in chief and cross examination had been satisfactory. For example, Sheriff "A" commented that "... unless there is an interim matter, I doubt whether a reporter is particularly useful .... I doubt if I would pay much attention to the reporter's findings because when I am in the hearing I am in the situation where I am able to listen to the evidence of the whole case .... a report is not going to take the place of a proof ... [or] ... materially change the nature of a proof."

The WCS representative also doubted whether, as things stand at the moment, reporters could actually be of much assistance to the children themselves unless they were carefully selected. It was argued that reporters often do not relate well to children: "... the so-called professionals in the social work department do not know how to confront things in a way that a young child or adult will know what they mean." In addition, both social workers and lawyers recognised that they each had failings as reporters - social workers did not know what a sheriff might find important, and lawyers are amateurs in child care. None of the interviewees were able to agree on who might be most appropriate appointees.

It is therefore rather depressing to see the Child Care Law Review recommending the increased use of curators ad litem<sup>74</sup> (the Review used the term "reporter" in a different context from the fieldwork interviewees<sup>75</sup>) without giving any real attention to who should carry out this function, and what exactly they are meant to achieve.

(b) Second, the social work interviewees felt that the stress and restrictions of sheriff court adjudication led to the poor presentation of social work evidence. This meant that sheriffs were not in the position to evaluate fully their reasons for seeking the assumption of parental rights.

The other interviewees had little sympathy with this argument, although the majority felt that proceedings should be made rather less tense. It was argued that social workers were basically unhappy with the fact that they were being put under pressure in cross examination to justify their actions, and there is no doubt considerable weight in this contention. For example, Sheriff "C" commented "... effective cross examination is at the heart of the adversarial system. It is not meant to be easy ... maybe some social workers do not like getting their evidence tested."

Social work departments have developed the practice of leading evidence from senior social workers not directly involved in the case to act almost as expert witnesses<sup>76</sup> and to provide testimony on wider theoretical issues and social work policies. It was felt by the social work interviewees that this had generally been a success, although there was some concern that solicitors acting for the parents could use "tricks of advocacy" to discredit their evidence. However, all the shrieval interviewees felt that they would recognise and prevent solicitors from either side employing unfair questioning techniques. Sheriff "A" stated that "... if there was unfair cross examination then the court would have to intervene ... but of course we are dealing with very experienced solicitors - experienced in civil law - and I do not think this has been a problem." On balance, it is submitted that problems of this sort were more social work mythology about court appearance, rather than the reality.

Despite the developments noted above, some social work interviewees were still concerned that wider issues and social work theory which may have influenced decisions to assume parental rights are sometimes not fully brought out before the sheriff. RS "C" did occasionally find it difficult to ensure that "the link between the individual child and more contextual matters is direct enough to be relevant." However, it seemed that difficulties mainly arise when social workers and regional solicitors do not liaise properly prior to the hearing: the relevance of theory or contextual matters might then not be established during the examination in chief, which inevitably leads to difficulties for the social workers at cross examination. For example, two social work interviewees criticised their legal departments for not making what they felt to be proper use of social work precognitions: this had left them exposed in cross examination.

Notwithstanding these comments, it may well be that some social workers are at least partly responsible for their own discomfort under cross examination. RS "A" was of the view that social workers often use jargon and advance theoretical justifications without proper preparation. He commented that "if social workers are going to produce ideas which are not self evident they have got to produce evidence to support their background and show that they have done their homework. It is quite often the case that they do not understand the notions lying behind what they are saying." A similar point was made by RS "B": "There are some social workers who do not even know what parental rights mean and no matter how much one tries to prepare them they just cannot put things across in evidence ... some are then caught out in careful cross examination."

It is submitted that the argument that adjudication fails to present sheriffs with a good impression of the local authority case is not particularly convincing. The problem seems to be a lack of proper pre-hearing preparation, rather than the failure of the decision taking process.

(iii) The third and final area of concern was that of delay: the majority of interviewees felt that preparing for and conducting sheriff court adjudication was cumbersome and time consuming.

The issue of delay was brought out fully in Central Regional Council v. B.<sup>77</sup>. On appeal to the Court of Session, Lord Robertson made a powerful statement which illustrates the problem very clearly:

"The application was initiated in the sheriff court at Falkirk on 16 June 1981. On the objector's behalf a motion to sist for legal aid was made and granted on 19 August 1981. Thereafter the case proceeded with repeated delays. It was not until 26th January 1983 that the stage of a proof on the application was reached. Apparently this proof was allowed to extend over 10 days followed by a hearing of the agent for the applicant and counsel for the objector which also lasted ten days. It was not until 14 June 1983 - some 26 months after the passing of the resolution by the applicants - that the sheriff made his decision .... Procedure in a summary application under this section of the 1968 Act ought to ensure that the matter is dealt with precisely and speedily. The welfare of children is at stake. In addition, the delay which has been caused has by this time overtaken the merits of the application and objections, the situation of the parties - including the children - having altered since April 1981 .... The history of this case is a matter for disquiet and regret."

The interviewees felt that it was unlikely - largely because of the serious criticisms made in Central Regional Council v. B. - that an assumption of parental rights case could ever again be conducted with so little attention given to time. It was recognised that the nature of the proceedings required speedy decision taking in the interests of the children (if not the parents). For example, Sheriff "A" commented that " ... the longer the process takes then the more the child is separated from the natural parent [ie provided they are not already in care] and the longer the child is separated from the natural parent then the less chance the child has of surviving in a relationship with the parent should the assumption of parental rights fail". Sheriff "B" agreed, stating that " ... the amount of time which it takes to get a case to court and to deal with it in court is too long."

Two main areas of difficulty were established: (a) court timetabling; and (b) Legal Aid applications.

(a) The delay caused by unrealistic court timetabling was felt by a number of interviewees to be unacceptable. For example, Sheriff "A" commented that if "... an application was made, then it would be put in as soon as possible: but it is probable that it would only be timetabled for one day - that is almost certainly not going to be long enough. Most last three or four days and some last longer." Accordingly, it is clear that sheriff clerks ought to prioritise s.16 applications, and allocate a sensible amount of time for hearings: this would prevent adjournments and consequent delays.

There was wide support for accelerated procedures of the sort which operate in compulsory hospitalisations under mental health legislation<sup>78</sup> or referrals from children's panels.<sup>79</sup> It was felt that fixed statutory timetables should be established

to force the court administration to shape itself around the requirements of the child, rather than vice-versa.

(b) The other significant cause of delay was Legal Aid processing. Sheriff "B" was unequivocal; "I would like to see the whole of the Legal Aid process speeded up. The delays for the processing of applications seem to me to be quite unreasonable - it has taken four to five months on some occasions."

It does indeed seem quite extraordinary that parents should have to wait months to find out whether the civil legal aid fund is prepared to pay for the defence of parental rights - and it is surely even more unacceptable given that children are kept in care whilst the papers are being processed. The SCLC, in its interview and submission to the Child Care Law Review, recommended that Legal Aid should automatically be available to parents in order that the hearing can proceed without delay.<sup>80</sup> The vast majority of cases involve parents from low income groups: it is therefore perhaps a false economy to vet each individual s.16 application.<sup>81</sup> An alternative possibility might be that the sheriff should be empowered to grant Legal Aid as in referrals from the children's panels.<sup>82</sup> Unfortunately, the Review makes no mention of delay, or the desirability of immediate, non means tested legal aid. This is surely an important omission: it seems bizarre and anomalous that one important area of child law should make provision for legal aid when it is denied in another equally weighty area. It is submitted that the issue of delay and the difficulties it can cause should be given close consideration by the government in any statutory review of the power to assume parental rights by a local authority.

### Summary and Conclusion

It is contended that in both theory and practice, the sheriff's civil judicial powers in local administration are not contrary to the standards of ostensive judicial impartiality and competence. Indeed, the maintenance of these standards by sheriffs is an important justification for the continuation of shrieval involvement in this area of decision taking. The civil judicial powers are therefore in accordance with the general principles and wider rule of law theory set out in part one of the thesis.

However, as the empirical research into the assumption of parental rights indicates, shrieval adjudication can and should be made more efficient. Some of the points and criticisms which arose in the course of the fieldwork were subsequently picked up by the Child Care Law Review. However, it is contended that the Review has not given proper consideration to a number of problems - notably those caused by court formality, delay and the availability of legal aid. Attention must be given to topics of this sort before shrieval adjudication can fulfil its potential as a fully effective and fair decision taking process.

## **Chapter Fourteen: An Evaluation of the Sheriff as an Administrative Judge**

### **Introduction: Aims and Objectives**

Following on from the pattern developed in preceding chapters, it is intended to evaluate the last category of powers - the sheriff as administrative judge - using the general principles and theoretical arguments set out above. Empirically derived data is then used to test this evaluation, and to illustrate how shrieval adjudication operates in practice.

The chapter is set out as follows. Section one provides discussion of whether the sheriff's powers correspond with the theory and general principles of the rule of law.<sup>1</sup> It is contended that they do. This evaluation is taken further using empirical data. As in preceding chapters, a representative power was selected for empirical study. However, the empirical material is not separated from more general discussion: the grounds are effectively the same for all appeals in the category, and, as is clear from chapter nine, only a few statutes make use of them.<sup>2</sup> The arguments which are put forward are summarised in section two.

### **Section One: The Sheriff as an Administrative Judge and General Principles**

The powers in this category are concerned mainly with the licensing of individuals or premises for a variety of purposes. Provision is also made for appeals against the decisions of local authorities concerning permission for, and the regulation of, public processions, which may, in general terms, be viewed as a licensing function. The "parent" provision, which is either adopted in entirety or closely followed in all other appeals, is s.39 of the Licensing (Scotland) Act 1976<sup>3</sup> (the 1976



Act): given its subject matter (liquor licensing), this provision is one of the most frequently exercised powers in the category.<sup>4</sup> Discussion of the sheriff's jurisdiction as an administrative judge is therefore focused on s.39, although consideration is also given to the other appeals.

Three sheriffs participated in the fieldwork programme (Sheriffs "A", "B" and "C"), together with three senior district council solicitors (DCS "A", "B" and "C"). The sheriffs gave an important perspective on how the judiciary views the s.39 grounds of appeal. The solicitors were able to provide an extremely helpful overall picture of the way in which the appeal provision works. They are senior legal advisers to their councils, and as such assist councillors to reach a decision in the majority of appeals which are not heard under the 1976 Act<sup>5</sup>; they serve as Clerks to the District Licensing Board under the 1976 Act<sup>6</sup>; and also present the defence in appeals before the sheriff.<sup>7</sup> It was not possible to build up a representative sample of councillors or agents for appellants (as the majority of those who were approached were not interested in being interviewed). However, a partner in a large firm of solicitors<sup>8</sup>, who specialises in licensing appeals, provided a great deal of helpful information and comment.

The sheriff's remit in s.39 style appeals has been laid out by Parliament in such a way as to focus attention on legal and jurisdictional grounds.<sup>9</sup> Appeal to the Court of Session is competent, but only on a point of law.<sup>10</sup> The grounds are as follows. The sheriff may uphold an appeal and remit, reverse or modify the decision if he considers that a licensing board has -

(a) erred in law<sup>11</sup>;

- (b) based its decision on any incorrect material fact<sup>12</sup>;
- (c) acted contrary to natural justice<sup>13</sup>; or
- (d) exercised its discretion in an unreasonable manner.<sup>14</sup>

The general issues for consideration are the same as in previous chapters. Do the sheriffs' powers under statute involve them in the political process in a way that is detrimental to the standard of ostensive judicial impartiality?<sup>15</sup> Can it be said that the legislature has provided for an unacceptable polycentric effect<sup>16</sup> - is ostensive judicial competence<sup>17</sup> affected?

It is contended that by specifying the grounds noted above the legislature has shown itself to be sensitive to the argument that members of the judiciary ought not to be required to take decisions under statute which can require a "direct political involvement"<sup>18</sup> and cause a strong polycentric effect<sup>19</sup> without consideration being given to the importance of maintaining the standards of ostensive impartiality and competence.<sup>20</sup> Accordingly, the provisions in question buttress both the ethos of secondary morality<sup>21</sup>, and (indirectly) the rule of law itself.<sup>22</sup> In order to illustrate this argument, consideration should be given to three points. First, it must be appreciated that the general subject matter of the provisions involves a high political content. Second, it has to be shown that shrieval involvement in the decision taking process has the potential to give rise to a strong polycentric effect. Third, discussion of the grounds of appeal must show that the legislation limits these two factors in a way which is consistent with general principles.<sup>23</sup>

- (a) As indicated above, all of the statutes which make use of the s.39 formulation concern appeals from the decisions of licensing authorities. In the majority of cases,

the licensing authorities are either district or islands councils, or licensing boards<sup>24</sup> (which are comprised of district or islands councillors). The councillors are elected by the local government electorate every four years.<sup>25</sup> In urban wards in particular, they are elected to serve on a party political ticket, and may have campaigned for election on the basis of party policy arguments, as well as personal qualities and local issues.

The potential for breach of the standard of ostensive judicial impartiality is clear. If the legislature had made provision for sheriffs to overturn the policy or merits based decisions of councillors, it is not difficult to imagine sheriffs being criticised for imposing subjective views on democratically elected authorities. Although licensing by its very nature involves serious consequences for individuals and commercial interests, and therefore questions of individual rights and procedural fairness, it should also be appreciated that local authorities are the most appropriate bodies to withhold or vary licences on community interest grounds.<sup>26</sup> For example, local feelings may run high on the question of whether a public house should be licensed in a particular area, or violence and disturbances outside licensed premises, and it would be difficult to argue that an unrepresentative sheriff is a better judge of the merits of community interests than an elected authority. Accordingly, DCS "A" stated :

" I do not think that if a party does not like an authority's decision, there should be a right of appeal to the sheriff who can run through the whole case again. The main discretion is that of district councillors who are elected by the people - they are the ones who are on the licensing authority and they are representative. ... I

believe that the District Licensing Board is the body whose decision counts the most - it is not just the first stop, it is the body."

(b) Similarly, when it is appreciated that licensing authorities develop and operate policies, the potential for a strong polycentric effect<sup>27</sup> becomes apparent. DCS "B" noted that:

"Licensing boards have policies - indeed, the only way that they can operate consistently is by having a policy based approach to different applications. I think it is vital that licensing authorities' policies are defended from sheriffs."

If sheriffs had been given strong discretionary powers to review the decisions of licensing authorities, it is very possible that, because of the constraints of the adjudicatory process<sup>28</sup>, they would have taken little account of the policy implications for authorities which could arise out of a single court decision. Indeed, as the discussion of higher governmental powers has shown, it is possible that authorities could have been prevented from basing decisions on general policy grounds, as the court could have insisted that each application was to be considered on its individual merits.<sup>29</sup> An authority's evaluation of the merits would then be subject to the discretion of the court. As is noted below, some sheriffs took this approach under pre-1976 betting and gaming legislation.<sup>30</sup>

The competence of the court to appreciate the polycentric significance of the merits can also be questioned. For example, DCS "A" commented that "... in many ways the licensing board is far better qualified than any judge to decide on licensing matters. They are much more familiar with local situations than sheriffs and they see the whole broad picture - the problems which can arise - in a way that the sheriffs

cannot."

Given Fuller's general point that the stronger the potential for polycentric effect, the less suitable adjudication becomes<sup>31</sup>, it is argued that for the legislature to have allocated to sheriffs a strong discretion in licensing appeals would not have been in accordance with ostensive judicial competence. The result of strong shrieval discretion would most likely have been uncertainty and inconsistency in decision taking, and dissatisfaction with the adjudicatory process as a means of reaching decisions. Viewed in general terms, a strong discretion would be indirectly harmful to the rule of law and the reputation of adjudication for efficient and thorough decision taking.<sup>32</sup>

(c) These general points were implicitly recognised by the Clayson Committee's report into Scottish licensing law, which stated that licensing "is basically a system of control ... of a commercial activity in the interests of the inhabitants of a locality, striking a balance between the many factors that come before the licensing authority. ... the licensing process is the application of an administrative discretion in the interests of the community and it is therefore not an appropriate function for a court of law."<sup>33</sup>

It was this concern which led the committee to support the recommendation of the Guest Committee<sup>34</sup> that the grounds of appeal to the sheriff should be limited to decisions which are "... wrong in law, "ultra vires", or fundamentally bad or an unreasonable exercise of discretion".<sup>35</sup>

As indicated above, the legislature has, following on from these recommendations, limited the focus of the sheriff's appellate powers to legal and

jurisdictional matters through the grounds adopted in s.39 of the 1976 Act - although the shrieval remit is broader than was originally envisaged by the committees.<sup>36</sup> This was very clearly appreciated by the shrieval interviewees. For example, Sheriff "A" commented:

"One cannot really decide questions of policy ... the s.39 appeals are very different in that what we are required to do is to look at questions of law and in some cases questions of fact - however, the fact is usually readily attainable. One looks at the evidence and on the basis of the evidence the decision is made. The policy of the local authority may well be disclosed but the only question for the sheriff is whether that policy if acted upon and expressed in the matter under appeal is a lawful policy under the Act. The answer to the case is shown in the relevant section of the Act: it must be decided on the basis of a simple question of law."

Sheriff "B" was also appreciative of the limitations on the court's jurisdiction imposed by s.39: "It is necessary to limit our [ie sheriffs'] remit to matters which are proper for a court to determine. It used to be different when licensing appeals [ie in betting and gaming] to the sheriff used to be "open house" and we were virtually rehearing the case. That was a relic of the days when we were local administrators. But since licensing boards have been constituted in their present form, our function is clearly intended to be an appellate one. I think it is quite right that the questions we are asked to consider should be limited to issues which are suitable for appeal, rather than the substitution of one man's opinion over the authority's opinion."

Sheriff "C" made the same points in even stronger terms: "From the judicial point of view it is a nightmare looking into matters which involve policy. The one

or two pieces of legislation which involve s.39 make it clear on what basis I am making a procedurally based review - this makes life an awful lot easier."

This is not to claim that the court's decisions do not affect the policy based considerations of licensing boards - but the sheriff's discretion is very much more restricted than in higher governmental powers: the court is limited to what can be termed "indirect political involvement".<sup>37</sup> The general view of interviewees was that the limitations imposed by the statute<sup>38</sup> were reasonably effective. For example, DCS "A" commented:

"Experience has shown that the sheriff does not have carte blanche to do what he wants. If the sheriff was to take a decision saying, "The board took a reasonable decision, but I do not like it so I am going to change it", then I [as a District Council Solicitor] would be able to appeal that to the Court of Session."<sup>39</sup>

It is important to note that the limitations placed upon the sheriff are very different from those set out in, for example, school placing legislation.<sup>40</sup> Viewed in a theoretical context, the s.39 grounds can be seen as a statutory version of common law mechanisms of secondary morality<sup>41</sup>, which protect ostensive judicial impartiality and competence by limiting the judicial remit in a way that avoids direct consideration of substantive merits and policy. The mechanisms in question are the grounds of common law judicial review.

Clearly, it could not be claimed that the grounds in s.39 are identical to those of common law judicial review, as summarised by Lord Diplock in CSSU v. Minister for the Civil Service<sup>42</sup>: illegality, irrationality or procedural impropriety on the part of the decision taker. There are, however, obvious similarities, which are



considered below. Indeed, it is worth noting that the s.39 formulation and judicial review in the Court of Session complement each other: when a statutory appeal to the sheriff is incompetent, an application may be made to the supervisory jurisdiction for judicial review. The nature of the grounds of appeal are considered in some detail below. More specifically, attention is given to the way in which they safeguard the standards of ostensive judicial impartiality and competence.

However, before embarking on discussion of the grounds of appeal, brief notice should be taken of the point that the court views s.39 appeals as "judicial" rather than "administrative" business. This was made clear at an early stage by Sheriff Principal O'Brien in Martin v. Ellis<sup>43</sup>: "All these considerations have led me to conclude that the right of appeal conferred by s.39 is an appeal to the sheriff in his judicial rather than his administrative capacity." This finding confirms the general characterisation of s.39 style appeals as having a "judicial" nature, as argued in chapter nine.<sup>44</sup> With this point in mind, consideration should now be given to the different grounds of appeal.

(i) Section 39(4)(a), which empowers sheriffs to uphold an appeal on the basis that the licensing authority has erred in law, encompasses a wide range of legal and jurisdictional concerns. That it includes ultra vires decision taking was made clear by Lord Mayfield in Allied Breweries Ltd v. City of Glasgow Licensing Board<sup>45</sup>. In D & A Haddow v. City of Glasgow Licensing Board<sup>46</sup>, the licensing authority was held to have "misdirected [itself] and so erred in law", by basing its decision on a set of criteria which had little relevance to the appellant's circumstances. Another good example of error in law can be found in Hart v. City of Edinburgh District Licensing



Board<sup>47</sup>, which concerned a question of interpretation which had arisen from poor legislative drafting.

Without delving into the distinction between errors in law going to jurisdiction, and error in law in other respects, it can be appreciated that the sheriff's function under the subsection is one which is clearly within the judicial remit. It could not be claimed with much conviction that the sheriff has a strong discretion to overturn the merits of a licensing authority decision. DCS "A" did, however, note that there was at least the potential for sheriffs to manipulate their jurisdiction:

"The majority of s.39 appeals involve the question of error in law, which gives sheriffs a very wide power of review. There's nothing wrong with that - but it is also where sheriffs can "hang their wig", saying, "What do I think the decision ought to be? Perhaps it is this - so let's find a reason, and turn it round so that it seems that there has been a misinterpretation of the law as opposed to a flawed decision."

It is worth noting that none of the interviewees (DCS "A" included) felt that this was a significant problem. Indeed, DCS "A" concluded by stating that "...sheriffs should be able to look at error in law, otherwise it would be for the clerk and no-one else to interpret the law."

The sheriff's power of review in practice is focused on the construction of statutory and common law rules within the context of conventional statutory interpretation and stare decisis.<sup>48</sup> In terms of the theoretical terminology adopted above<sup>49</sup>, the sheriff is able to operate the mechanisms of secondary morality without there being any real concern that the standard of ostensive impartiality is being

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by Lord  
Tancey in  
O'Neill v  
Joint Scottish  
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compromised.

Clearly, a shrieval decision on error in law has the potential to cause a significant polycentric effect<sup>50</sup>. However, in practice the effect is limited. As indicated above, sheriffs have been careful to avoid intervention in policy or the evaluation of merits under the guise of error in law. This interpretation of the shrieval function makes it very difficult to argue that the degree of polycentric effect is unacceptable<sup>51</sup>, given that, as DCS"A" implied above, it is in general terms desirable to have alleged errors in law reviewed by an ostensibly impartial legal expert. Ascertaining whether there has been an error in law is, although not an uncontentious area for sheriffs, one in which their suitability for the function is unlikely to be questioned closely. The adjudicatory process is also a highly efficient mechanism for determining an appeal on this ground, which may involve individualised, detailed arguments on points of law.<sup>52</sup> It is therefore contended that s.39(4)(a) cannot be viewed as being contrary to ostensive judicial competence.

(ii) Section 39(4)(b) - which stipulates that the sheriff may intervene in decisions which are based on an incorrect material fact also has the potential to give rise to problems. It causes a considerable degree of difficulty<sup>53</sup> in practice given the nature and amount of fact which authorities must consider, and the evidential problems which can arise. For example, under the 1976 Act, licensing boards may hear evidence from the chief constable, planning and environmental officers, the applicant, the applicant's agent<sup>54</sup>, and petitions representing local communities.<sup>55</sup> Members of the board itself may express views, based on their local knowledge. As evidence is not given on oath, the Board faces the problem not only of evaluating

evidence of a technical nature (eg from environmental health or planning officials), but of deciding whether the potential problems or advantages of a particular application have been exaggerated or minimised.<sup>56</sup>

Importantly, the sheriff is given the power to hear evidence on an appeal which is brought under this subsection. The reason for this is clear: it would be impossible to have any meaningful examination of whether material facts were correct or incorrect without evidence being heard. The fact that the power to hear evidence is limited to appeals under subsection (4)(b)<sup>57</sup> is noteworthy. It perhaps indicates an intention on the part of the legislature to limit the sheriff when hearing appeals under the other subsections to a legal debate on the validity or correctness of the board's decision.<sup>58</sup> This contrasts very sharply with the sheriff's higher governmental powers, where he is put in the position of being a *de novo* decision taker.<sup>59</sup> It should be noted that the Civic Government (Scotland) Act 1982, in its version of the s.39 formulation, does not restrict the sheriff's power to hear evidence to this ground alone.<sup>60</sup>

Clearly, the subsection also marks something of a divergence from the grounds of common law judicial review, where judges are wary about interfering in the decisions of administrative bodies on the grounds of incorrect material fact. In a recent article, Jones<sup>61</sup> points out the importance of mistake of fact: "... it raises fundamental issues as to the proper scope of judicial review".<sup>62</sup> In general terms, the issue for consideration is how much judges should interfere with the decisions of public authorities: determining whether a fact is material may potentially have a powerful effect on an authority's decision.<sup>63</sup>

It is contended that the provision that sheriffs can investigate incorrect material facts does not destabilise ostensive judicial impartiality - although it has the potential to do so. The reason for this is comparatively clear: sheriffs do not view their powers under the subsection as providing a strong discretion to substitute their own interpretations of whether facts are material for those of the licensing authorities.<sup>64</sup> The power of the court may therefore be viewed as being limited according to a test which is similar to that which Jones suggests common law courts have adopted: for intervention to be contemplated, the factual error must be material in the sense of being a "cardinal" error.<sup>65</sup> In this respect, a sheriff court appeal is not likely to be enormously different from Jones' doctrine of mistake of fact in common law judicial review, although the fact that decision based on incorrect material fact is a specific statutory ground does give the sheriff rather more justification for intervention than a common law court. Accordingly, whereas a common law judge would be highly unlikely to interfere with the decision of an administrative body on the ground of material error of fact alone, the sheriff may do so if an appellant is successful in proving that the authority reached its decision on the basis of incorrect material fact. However, for the reasons indicated above, it is contended that, in the final analysis, the provision cannot be criticised on the grounds that it has encouraged sheriffs to exercise a wide discretion over the merits of licensing authority decisions. Although the subsection takes the grounds for judicial involvement further than judicial review, it is not wholly inconsistent with recent mainstream common law developments.<sup>66</sup> As such, it may be viewed as meeting the standard of ostensive judicial impartiality and the wider ethos of secondary morality.

Cases missed out in footnote! Aithen, Loosefoot and Ant Wells

With these considerations in mind, it is difficult to see how it can be argued with any great conviction that shrieval review of alleged incorrect material fact involves an unjustifiable degree of polycentric effect.<sup>67</sup> There is certainly the potential for some effect, but - for as long as the court restricts its discretion - it is effectively limited to an acceptable level. Most would accept that decisions which are based on incorrect material fact are seriously flawed, and in areas such as licensing, which may involve the weighing of important individual rights with a multitude of other factors, it is not unreasonable to view adjudication as a suitable means of resolving an appeal. This is particularly so when the difficulties that licensing boards have in terms of gathering reliable evidence are borne in mind. Indeed, in Martin v. Ellis<sup>68</sup>, it was noted that a sheriff who had the opportunity to hear evidence on oath may be better informed than a licensing authority which had reached its decision without hearing evidence.

Accordingly, the power of review allocated to sheriffs under this ground cannot be viewed as being likely to result in criticism of adjudication as a decision taking process, or a high degree of uncertainty and inconsistency: s.39(4)(b) should not be thought of as being contrary to the standard of ostensive judicial competence.

(iii) Section 39(4)(c) stipulates that a sheriff may review the decision of a licensing authority if it has breached natural justice. Interestingly, the equivalent ground concerning appeals from local authority decisions on public processions under the Civic Government (Scotland) Act 1982 does not mention natural justice explicitly, and states instead that the sheriff may interfere with an original decision if the council had "otherwise acted beyond their powers".<sup>69</sup> This may be taken to indicate an

appreciation of Lord President Emslie's comment in Cigaro (Glasgow) Ltd v. City of Glasgow District Licensing Board that "There is no magic in the words "natural justice.""<sup>70</sup>, although it is more likely to be a reflection of the suggestion that "the draftsman has been quite prepared to vary the formula to reflect in some measure the difference between the powers reviewed."<sup>71</sup> However, for the reasons indicated above<sup>72</sup>, consideration is focused on s.39(4)(c) of the 1976 Act, which bears a more obvious similarity to the traditional common law ground for judicial review. Accordingly, the position of the court is comparatively straightforward, although the composition and nature of licensing authorities has caused difficulties.<sup>73</sup>

For example, members of licensing authorities are permitted to make use of their own local knowledge when considering applications - but the question of the effect of bias on the part of members can cause difficulties, as was illustrated by Tennent Caledonian Breweries Ltd v. City of Aberdeen District Council.<sup>74</sup>

However, sheriffs have for the most part been concerned with the application and development of the right to a fair hearing.<sup>75</sup> Accordingly, although authorities may base decisions on the local knowledge of members, those involved in the application must be given the opportunity to comment. More generally, if an authority proceeds on the basis of information which is unknown to the party, the court will hold that there has been a very clear breach of natural justice.<sup>76</sup> Sheriffs have also been swift to intervene if licensing authorities have not taken sufficient care to distance themselves from interested parties.<sup>77</sup> There have been some very obvious breaches of this basic rule. For example, in Coppola v. Midlothian District Licensing Board<sup>78</sup>, the decision of an authority was struck down because it had consulted with

one of its officers, whilst apparently disregarding the fact that he had submitted an objection to the application in question. Similarly, (in a case which was heard prior to the 1976 Act) it was held to be contrary to natural justice for a licensing authority to communicate with an interested party when the others were not present.<sup>79</sup>

However, it should be noted that the provision does cause some difficulty in practice, at least in appeals heard under the 1976 Licensing Act. A number of case reports<sup>80</sup> have indicated that it was extremely difficult to determine whether a breach of natural justice has occurred, as the sheriff is unable to call for evidence. Sheriff "B" commented that this had caused some confusion when hearing appeals:

"I have been confronted with the situation where it has been argued that the licensing authority's decision is contrary to natural justice, but one is not allowed to hear evidence under that sub-heading. For example, if the allegation is that a matter is contrary to natural justice because the chairman of the licensing board is a shareholder of the company in question and the allegation is denied, then there is no way of knowing how to decide the case."

Notwithstanding this difficulty, which is avoided in appeals under the Civic Government (Scotland) Act 1982<sup>81</sup>, it would indeed be difficult to view this subsection as providing for an unjustifiable degree of shrieval involvement in the affairs of licensing authorities. It is surely right and proper for the legislature to insist that authorities, when taking decisions which may have profound implications for the individuals involved, should be bound by natural justice.<sup>82</sup> Similarly, there can be little criticism of the appointment of the sheriff as the judge empowered to ensure fair procedure: it saves time and money for the parties, as the only course of action



available to them (had the statute not provided for access to the sheriff) would have been to apply for judicial review under the supervisory jurisdiction of the Court of Session.<sup>83</sup>

In overturning breaches of natural justice the sheriff is able to act within the conventional limits of statutory interpretation and stare decisis. The sheriff is not taking decisions requiring a "direct political involvement": although operating in the political arena, the remit is limited to an area where it is acknowledged that judges should be entrusted with powers of decision. Ostensive judicial impartiality is not threatened by the provision. Indeed, it can be argued that his position as guardian of fair procedure in decision taking buttresses shrieval impartiality and therefore, in an indirect sense, corresponds with the ideal of judicial independence.

Similarly, determining whether there has been a breach of the rules of natural justice is very clearly a function which is in accordance with the standard of ostensive judicial competence. Any polycentric effect which may arise from a shrieval decision is, by the very nature of the sheriff's task, justifiable and appropriate.<sup>84</sup> It is submitted that it is entirely desirable for the legislature to make provision for review of the decisions of licensing authorities on the basis of alleged breaches of natural justice: the value and importance of applications for individuals means that it is important that there is external and authoritative review to ensure fair procedure. It is difficult to criticise the use of court based adjudication in this context. Indeed, its attributes as a decision taking process make it a highly suitable mechanism for determining issues of this type.<sup>85</sup> It should be noted, however, that the effectiveness of adjudication has been seriously hampered by the provision in the 1976



Act which prevents sheriffs from hearing evidence under this ground. Accordingly, it is contended that sheriffs should be able to hear evidence in all s.39 style appeals concerning breach of natural justice.

(iv) The final ground of appeal - that the sheriff may uphold an appeal on the ground that the authority had "exercised its discretion in an unreasonable manner"<sup>86</sup> - again restricts the ability of sheriffs to consider the merits of licensing authority decisions. The question for consideration is whether it limits that discretion in a way which is in accordance with ostensive judicial impartiality and competence.

The first point to note is that sheriffs are not given an ex facie unrestricted power to intervene in the merits of licensing authority decision taking in the way that they are in higher governmental provisions. It should therefore be noted that the second edition of Allan and Chapman's commentary on the 1976 Act is potentially misleading in stating that, "This is the same ground as that which entitles the sheriff to allow an appeal made to him in his administrative capacity."<sup>87</sup> In fact, the "administrative" (ie higher governmental) provisions make no formal statutory restrictions in terms of the sheriff's powers to review on the merits<sup>88</sup>, and, as has been pointed out at length above, those which have been established by the court are inconsistent and permit differing degrees of discretionary power.<sup>89</sup> It is likely that Allen and Chapman are referring to Lord Low's test in Allen<sup>90</sup>, which has a rather uncertain status following the Rodenhurst decision.<sup>91</sup>

By its very existence, subsection (4)(d) prevents sheriffs from ever taking the view that they have a very strong discretionary power on review. The question is whether, within this constraint, the test of reasonableness has been interpreted by

sheriffs in such a way as to create a degree of discretionary power which might be viewed as being inappropriate, given the strong political content and the potential for an unacceptable degree of polycentric effect in licensing generally.

The test of reasonableness adopted in licensing cases has its origin in betting and gaming legislation. Prior to the extension of the s.39 grounds to betting and gaming, the sheriff's powers to review the decisions of licensing authorities under the Betting, Gaming and Lotteries Act 1963<sup>92</sup> and the Gaming Act 1968<sup>93</sup> were effectively higher governmental powers: there was no formal statutory limitation of the sheriff's discretion. Accordingly, there was a degree of confusion and variation from sheriff to sheriff, with some holding that they had a comparatively strong discretion and others taking a rather more "benevolent"<sup>94</sup> approach similar to that which was adopted by Sheriff Macphail in Carvana<sup>95</sup>.

An example of the former can be found in Aitken v. Motherwell and Wishaw Licensing Court<sup>96</sup>, where the sheriff held that "... a licensing court has no power to pass a policy resolution"<sup>97</sup>, which naturally limited the ability of the authority to develop policy based administrative rules to guide future decision taking.

However, in Patullo v. Dundee Corporation<sup>98</sup>, Sheriff Kidd took a very different approach. She felt that the legislation required the sheriff to act in an "administrative" (ie higher governmental) capacity, and adopted the approach of Lord President Clyde in Kaye v. Hunter and Lord Low in the Allen case: "... I have to ask myself whether in refusing the appellant's application for a permit the respondent acted unreasonably or capriciously".<sup>99</sup> It was felt that beyond considering these points, it was inappropriate for the court to limit licensing authorities. There was also

clear recognition of the potential for an unjustifiable degree of both "direct political involvement" and polycentric effect:

"... The local licensing authority, as the duly elected custodian of public order, is the best judge of what is desirable or the reverse in its area.... ... It has sometimes been suggested that when a local authority reaches a decision on a general principle, ..., that is an unreasonable exercise of its discretion. I do not agree with this view. While there are circumstances in which a discretion can only be exercised by having regard to particular and individual circumstances, where a statutory discretion is conferred on local authorities, it must frequently be exercised on the basis of local policy."<sup>100</sup>

Sheriff Kidd's approach was implicit in other decisions.<sup>101</sup> For example, in an appeal concerning amusement machines, the sheriff held that the "... exercise of a discretion by a local authority is not necessarily bad because they use it to outlaw from certain premises in their area a perfectly lawful machine which may be welcomed as a desirable amenity by their next-door neighbours."<sup>102</sup>

This line of argument was adopted by the court as the test of reasonableness for the 1976 legislation.<sup>103</sup> Accordingly, the court does not view reasonableness as providing a strong discretion. The potential for shrieval involvement in policy and evaluation of merits is limited. Sheriffs do not feel uneasy about the range of their discretion. For example, Sheriff "C" commented that he had "... never found any particular difficulty with it as a ground of appeal". Similarly, Sheriff "B" stated that, "There is quite a body of law on the issue. Unreasonableness certainly causes argument, but it has not caused difficulties which have been insuperable."

The court has developed its jurisdiction within these boundaries. Accordingly, it has been held that authorities are acting unreasonably when they fail to compare like with like, or adopt unreasonable criteria. For example, in Crolla v. City of Edinburgh District Licensing Board<sup>104</sup> it was held that the "lumping together" of all the different categories of licence to determine whether there was over-provision of facilities made the decision "... prima facie unreasonable, since it is reasonable to assume that, if they had not found it necessary to bolster up their decision by mentioning irrelevant factors they would have felt obliged to grant the application".

The close relationship between s.39 and common law unreasonableness is such that the former is now indistinguishable from the grounds developed by the Court of Session in judicial review. This appears to have come about as a result of the recent expansion of judicial review in general, and in licensing cases in particular.<sup>105</sup> Sheriffs are now effectively applying the same test of reasonableness under s.39 appeals as the Court of Session does in common law judicial review. The traditional ground of "capricious and arbitrary" conduct<sup>106</sup>, which sheriffs such as Sheriff Kidd<sup>107</sup> felt necessary to justify intervention when acting in an "administrative" role, has been merged with Wednesbury<sup>108</sup> unreasonableness and GCHQ<sup>109</sup> irrationality. Accordingly, the main commentary to the 1976 Act<sup>110</sup> notes Bury v. Kilmarnock and Loudon District Licensing Board<sup>111</sup>, which concerned a common law judicial review of a licensing authority decision (which was not appealable under the s.39 formula), as its most recent authoritative statement of unreasonableness.

Since the publication of the commentary, a number of cases have been heard in the Court of Session, providing further examples of the common law test of

reasonableness in operation in the licensing context. These must be viewed as taking the definition of s.39 unreasonableness further. In Semple v. Glasgow District Licensing Board<sup>112</sup> it was stated in the Outer House that, "... the question is not whether the court would regard that [ie the criteria adopted by the authority] as a correct or sufficient ground of distinction but whether the respondents are entitled to regard that as a sufficient ground of distinction without transgressing the limits of reasonableness." In Elder v. Ross and Cromarty District Licensing Board<sup>113</sup>, Lord Weir took a similar approach, but adopted Lord Diplock's terminology: "It was not suggested that, if the board was entitled to adopt a policy, it was not allowed to change it from time to time or that the board was required to justify to the court the reason for the policy or the change of policy, unless the policy or change carried out could perhaps be challenged on the separate ground of "irrationality"."

To conclude, it is contended that the potential for an "indirect political involvement" is restricted to an acceptable level by the requirement that the sheriff has to be convinced that the authority must have acted "unreasonably" before a decision can be modified or reversed. The reasonableness test may be viewed as a mechanism of secondary morality<sup>114</sup>, in that it discourages sheriffs from adopting a strong discretion in decision taking: in effect, the authority must act in a capricious or arbitrary fashion for a decision to be altered by the court. The development of a close relationship with common law unreasonableness (ie Wednesbury<sup>115</sup> unreasonableness and GCHQ<sup>116</sup> irrationality) ensures that sheriffs do not feel free to review the merits of an authority's decision in a way which could be interpreted as being contrary to the standard of ostensive judicial impartiality. Whilst it should be noted that the

reasonableness test is not without its own difficulties for sheriffs<sup>117</sup>, they are nonetheless able to utilise it in a way which does not give rise to any serious concern that, as unrepresentative judges, they may be imposing subjective value judgements on elected authorities in areas with a high policy content.

The restrictions imposed by the reasonableness test also narrow the potential for an unacceptable degree of polycentric effect<sup>118</sup> in the licensing process. The stringent limitations which are imposed on the court by reasonableness show clear recognition of the point that courts are functionally ill-equipped to review policy based decisions. Accordingly, the shrieval remit is limited to considerations which, although requiring a skilful and careful exercise of discretion, are generally viewed as being appropriate functions for a court - the protection of individuals from arbitrary and capricious decision taking by administrative authorities. Adjudication is the most suitable means of reaching decisions within this limited context: the individual appellant's case is examined in detail, reasoned arguments are presented to an impartial sheriff, reasons are given for the decision, and appeal is competent on a point of law to the Court of Session. In addition, sheriffs are not free to adopt subjective interpretations of unreasonableness, as Sheriff "B" noted above<sup>119</sup>: the court must reach its decision on the basis of authoritative and well-established precedent.<sup>120</sup>

With these points in mind, s.39(4)(d) cannot be said to give rise to uncertainty and inconsistency in decision taking, or to expose the court based adjudicatory process to criticism: it may therefore be viewed as being in accordance with the standard of ostensive judicial competence, and the wider values of the ethos of

secondary morality and the rule of law.

## **Section Two: Summary and Conclusion**

It is contended that the provisions in this category avoid the potential for a strong "direct political involvement" and an unacceptable polycentric effect. They do not conflict with the standards of ostensive judicial impartiality and competence, and are therefore in accordance with the theory and general principles of the rule of law set out in part one of the thesis.

As is exemplified in the discussion of the empirical material and grounds of review, functions of this nature are highly appropriate for allocation to sheriffs: they also illustrate the potential that the sheriff possesses as a complement to the common law review function of the Court of Session. However, although it is argued that shrieval adjudication is largely effective as a decision taking process, the evidential restrictions placed on sheriffs in appeals under the 1976 Act appear to be highly anomalous.



## **Chapter Fifteen: Summary and Conclusion**

The aim of this thesis as set out in the introductory chapter was to resolve "the uncertainty relating to the sheriff's powers on administrative appeals"<sup>1</sup>, and, having done so, to evaluate and criticise the sheriff's role. The ad hoc and unstructured development of the sheriff's statutory functions in local administration has meant that achieving this aim was not a straightforward task.

It was recognised at the outset that Bradley was correct to argue that fundamental to any assessment of the sheriff's functions was the construction of theoretical "general principles"<sup>2</sup>, which can provide standards or criteria against which they can be judged. However, devising general principles is not a simple task, as it necessitates the development of a coherent ideal of the role of the judge and court based adjudication in administrative law.

Accordingly, Part One of the thesis (ie chapters one and two) sets out a discussion of the ideal limits of adjudication by judges, with particular reference to administrative law. It was contended that the basis of any general standards or principles was the doctrine of the rule of law. Particular attention was given to the work of Raz<sup>3</sup>, who argued strongly (and convincingly) that adherence to the rule of law means little more than adherence to the ideal that "... the law must be capable of guiding the behaviour of its subjects".<sup>4</sup> Put simply, promotion of the rule of law is promotion of certainty and consistency in the law. Raz also argued that the rule of law gives rise to a number of "derivative principles"<sup>5</sup>, the most important of which is the independence of the judiciary.



It was assumed that any British legislature would always seek to uphold the rule of law as a matter of course, although it was also recognised, in accordance with Raz's arguments, that the emphasis given to it when pursuing "social goals" may vary to some extent.<sup>6</sup> Whilst agreeing strongly with Raz's central arguments, it was, however, felt necessary to argue that his highly analytical approach to rule of law theory obscures the point that, in some legal systems, the rule of law is rather more than a distant ideal: indeed, it has, to a very considerable extent, shaped entire legal and constitutional systems. Given the obvious importance of the rule of law in liberal theory, these systems were termed "developed liberal systems". Scotland is an example of this type of legal system.

It was contended that in developed liberal systems, the rule of law is the "primary morality" of the legal system (nb the term "morality" was used in a highly restrictive sense). An important derivative of primary morality is "secondary morality", which was described as "... a cultural consensus [ie in developed liberal systems of law and government] that the rule of law and its derivative principles should be protected from pressures which could seriously destabilise them and therefore create a crisis for liberal values."<sup>7</sup>

The secondary morality of the rule of law has three main qualities. The first is the "ethos" of secondary morality, which was described as comprising "in the broadest possible sense ... the traditional positivist model of law as an impartial instrument which can be used for enlightened or oppressive purposes."<sup>8</sup>

The second quality is comprised of the "standards" of secondary morality, and these have a special significance in the construction of general principles for the

evaluation of the sheriff's powers in local administration. The standards serve as criteria which seek to ensure that the judicial function is in accordance with the ethos of secondary morality and therefore the rule of law.

The two standards which are considered at length are "ostensive judicial impartiality" and "ostensive judicial competence". The former requires not only that the judiciary strives to present itself as impartial, but that it is seen as being so: this protects judicial independence, and certainty in the law. The latter standard, ostensive judicial competence, is closely related, and builds on earlier discussion of Fuller's<sup>9</sup> ideas on "polycentric"<sup>10</sup> decisions and the proper limits of adjudication as a decision taking process. Ostensive judicial competence requires that judicial adjudication is not merely a competent decision taking process in a given area, but is also ostensively competent. It too protects the rule of law. If court based adjudicators take decisions which have a high polycentric content, or which are anomalous or anachronistic, then courts and adjudication will be viewed as being weak and inefficient: this will give rise to uncertainty in the law, which is contrary to the ideal of the rule of law.

The third quality of secondary morality is comprised of what is termed the "mechanisms" of secondary morality. This term is used to describe legal rules (both common law and statutory) which have been developed to bolster the ethos and standards of secondary morality. The main examples are the "rules" of statutory interpretation, stare decisis, and the use of the Institutional Writers, all of which impose a system and a degree of rigour on judicial decision taking. Ostensive judicial impartiality and competence are promoted, as is certainty in the law - and therefore

the rule of law itself.

These ideas were used to develop the general principles which were called for by Bradley.<sup>11</sup> Very briefly, two sets of general principles were devised. The first was termed "general principles for legislation". It was argued that the legislature of a developed liberal system, when creating statutory powers for the judiciary, should show itself sensitive to the potential destabilisation of the doctrine of the rule of law which can result from ill-considered legislation. The legislature should therefore seek to ensure that statutory provisions do not challenge ostensive judicial impartiality or competence. Most particularly, the legislature should avoid creating powers which involve judges in areas which require what was termed a strong "direct political involvement", or which have a strong polycentric effect. The second set of general principles provided standards for evaluating the exercise of judicial discretion. Very broadly, it was argued that judges should seek to uphold the rule of law: this means that in the exercise of discretionary powers, they should attempt to maintain ostensive judicial impartiality and competence.

It was recognised that applying these general principles of the rule of law to the sheriff's current jurisdiction would not, in itself, resolve the confusion and uncertainty surrounding it. Accordingly, Part Two (ie chapters three to seven) of the thesis sets out a discussion of the rather unusual and extremely ad hoc historical development of the sheriff's powers in local administration, from the advent of the "modern" sheriff court in 1747<sup>12</sup> to the present. Rather more specifically, the exercise had three main objectives.

First, to unravel the historical and socio-legal context of the sheriff's function

- to consider the wider pressures which have influenced the way in which the current jurisdiction has developed. The result is, it is contended, highly instructive. It became clear that, until recently, virtually the only attention given to the sheriff's functions in local administration was in respect of their potential as "ammunition" for opposing interest groups within the Scottish legal establishment. It is hoped that the parish pump nature of the debate between sheriffs depute and their substitutes, together with the snobbish petty-mindedness of many of the protagonists is illustrated clearly. The divisiveness of the debate was remarkable, and may be one of the main reasons why many of the sheriff's more unusual and wide-ranging powers in local administration have survived to this day: because the debate over powers was so closely bound up with the internal altercations of the shrieval bench, the judiciary itself gave little thought to the rather more significant question of whether their role had become anomalous or anachronistic. Whilst the continuation and development of wide powers for sheriffs in local administration was understandable, and indeed advantageous, during the eighteenth and much of the nineteenth century (when Scottish local administration was weak and unrepresentative), the democratisation of local and central government and the professionalisation of their executives during the last century were not given a great deal of attention by sheriffs. The largely unreflective and uncritical approach of sheriffs was adopted in official reports throughout the nineteenth and twentieth centuries: for example, the 1967 Grant Report on the Sheriff Court<sup>13</sup> was strongly supportive of the sheriff's traditional role in local administration.

The second objective was to trace the development of case law relating to the

sheriff's jurisdiction in local administration. Discussing case law, and the distinctions made by the court over the centuries, was useful in terms of providing background on how to analyse the sheriff's current jurisdiction. It became clear that the distinctions which are still made in modern decisions<sup>14</sup> between "administrative" and "judicial" functions have their origin in the law and practice of eighteenth and nineteenth century Scottish local administration: the division of the sheriff's functions into "ministerial" (later to be termed "administrative") duties and "judicial" duties was a feature noted in early case reports, the Institutional Writers and official papers.

More specifically, discussion of the development of precedent highlighted the point that argument from comparatively old decisions (eg Lord Low in Allen and Sons (Billposting) v. Edinburgh Corporation<sup>15</sup> and Lord President Cooper in Glasgow Churches' Council v. Glasgow Corporation<sup>16</sup>) is still highly relevant today, and has formed the basis of all recent court decisions. The question of anomaly and anachronism is therefore raised once more. The contradictory nature of these older authorities, and the subtle nature of the distinctions made by Lords Low, Cooper and Clyde in particular, were discussed. It was argued that there was a sophisticated but significant difference in approach taken by Lord Low on the one hand, and Lord President Cooper on the other: on careful consideration of their decisions, it became clear that they had adopted differing interpretations of the range of discretion available to sheriffs when acting "administratively" in local administration.

Their respective approaches were considered in the light of the theory and general principles of the rule of law developed in Part One: it was contended that Lord Low's restrictive definition of the discretion available to sheriffs in

"administrative" decision taking<sup>17</sup> was less likely to challenge ostensive judicial impartiality and competence than Lord President Cooper's approach.<sup>18</sup> The difficulties that had faced sheriffs who had attempted to reconcile the conflicting Court of Session authorities in order to delineate the range of their discretion under statute was also discussed: it was argued that, by failing to provide a clear statement on the limits of shrieval discretion, the Court of Session created a considerable degree of uncertainty and confusion in the law.

As a third objective, Part Two sought to give an idea of the subject matter and range of the powers held by sheriffs over the centuries. For reasons of space, it was not possible to provide a complete or highly detailed coverage, but nonetheless a number of points can be discerned. Many of the sheriff's important functions in local administration (eg electoral and fiscal duties, "striking" the fiars, maintaining the peace and mental health provision) can be traced directly to powers held in the medieval period by pre-1747 heritable sheriffs. The many duties held in connection with local government, registration, licensing, public health and housing grew out of the enormous social changes of the nineteenth century, which necessitated a rapid expansion in local government and social improvement legislation. Between the early and mid twentieth century, the sheriff's role was maintained and updated, despite the rapid growth of representative local authorities and central government. The 1967 Grant Report on the Sheriff Court indicated that, even until comparatively recently, sheriffs held a large number of powers in local administration, although some had been re-allocated to other authorities.<sup>19</sup> This is still the case today, notwithstanding the functions which have been lost in the last twenty-five years.

Accordingly, whilst the range and subject matter of powers held by modern sheriffs is at first glance ad hoc and unstructured, study of the historical development of different areas of activity has revealed a remarkable degree of continuity and lack of change. Set against the background of enormous developments in local and central government, this adds weight to the contention that the sheriff's function may be anachronistic and contrary to general principles.

Part Three of the thesis (ie chapters eight to ten) evaluates and analyses the modern sheriff's jurisdiction in local administration. The theory and general principles of the rule of law and historical material set out in Parts One and Two form the context for discussion. It was noted that the sheriff's jurisdiction was subjected to academic scrutiny by Himsworth<sup>20</sup>, who argued strongly that there was no longer justification for sheriffs continuing to exercise wide discretionary powers over Scottish local authorities. A number of sheriff court decisions (in particular Carvana v. Glasgow Corporation<sup>21</sup>) indicated that sheriffs are concerned by the range of their powers in administrative appeals. However, the recent decision of the Court of Session in Rodenhurst v. Chief Constable, Grampian Police<sup>22</sup> may, if anything, encourage sheriffs to exercise a stronger discretion when hearing statutory "administrative" appeals from the decisions of local authorities. This interpretation of the sheriff's function is therefore potentially contrary to the standards of ostensive judicial impartiality and competence.

Himsworth recognised that in order to criticise the sheriff's function closely, it was necessary to categorise the different "styles" of appeal.<sup>23</sup> In addition to discussing the continuation of general "administrative" appeals, he commented on two



important recent developments: powers which require the sheriff to find certain states of fact to exist before finding for the authority, and powers which require sheriffs to focus their attentions on legal or jurisdictional issues. After noting Himsworth's observations, it was decided to develop an analytical framework of powers, drawing on the general principles and historical material set out in earlier chapters. Although the dangers inherent in analytical classification were recognised, it was clear that, without some form of categorisation, discussion of the sheriff's current powers would be disjointed and lacking in structure.

Four categories were developed, and the sheriff's current powers allocated to them. The first (comparatively small) category was the sheriff as a "first instance executive authority". The powers in this category were derivatives of the sheriff's earlier ministerial and administrative powers, and involved them in local administration as first instance (and final) decision takers. The second category was the largest, and was comprised of those powers which involved the sheriff acting as "a higher governmental authority". These powers are essentially the same as those which the court has viewed, or would be likely to view as, "administrative" powers: they are comprised mainly of powers which are derived from the nineteenth century tradition of involving sheriffs as final appellate decision taking authorities in local administration. However, it is important to note that the means of differentiating them from other statutory appeals which can be taken from the decisions of public authorities is different from that developed by the courts. Instead, an analytical distinction, based mainly on the general principles of the rule of law, was devised. Using a simple protasis/apodosis mechanism, those appeals providing for a degree of



discretionary power which prima facie has the potential to challenge the standards of ostensive judicial impartiality and competence were differentiated from those which do not: the higher governmental category is comprised of the former. Accordingly, the third category - the sheriff as a "civil judge" - is made up of those powers which, under the protasis/apodosis mechanism, are unlikely to clash with the two standards of secondary morality: the sheriff is empowered to hear appeals from the decisions of local authorities which can be likened to ordinary civil court hearings. The final category - the sheriff as an "administrative judge" - is comprised of those powers which Himsworth identified as requiring the sheriff to focus on legal and jurisdictional grounds<sup>24</sup>, similar to those of common law judicial review. The grounds set out in s.39 of the Licensing (S) Act 1976 are the main model for this category.

Before taking discussion further, it was recognised that it was necessary to have a reasonably clear picture of the frequency with which the individual powers were exercised, although the dangers of relying too heavily on bare, "court-centred" statistics were noted. As the official statistics are largely unhelpful, a survey of court registers was carried out in twelve representative sheriff courts: sheriff clerks were also interviewed. The findings were interesting, although not surprising. It was clear that the number of appeals which were heard was comparatively small, although this did not necessarily detract from their significance for local authorities or individual appellants.

Part Four of the thesis (ie chapters eleven to fourteen) set out a full discussion of the different categories, and made use of empirically derived material. It sought to evaluate whether the different categories of powers are anomalous or anachronistic,

and to assess how well shrieval adjudication operates in practice. There were two main objectives. First, to discover whether the different categories are contrary to the general principles of the rule of law (ie by using the standards of ostensive judicial impartiality and competence), and to test the practical value of the theoretically based analytical framework. Second, to identify more general problems which arise in practice in each category of powers. The general conclusions were as follows.

None of the sheriff's functions as a first instance executive authority can be viewed as challenging the standard of ostensive judicial impartiality. However, they can be divided into two main sub-categories. The first is comprised of minor powers, which are obsolete historical anachronisms. Accordingly, they may be viewed as being contrary to the standard of ostensive judicial competence: the discussion of the sheriff's role as licensing authority for private clubs<sup>25</sup> makes this point clearly. The second sub-category is largely comprised of more weighty powers, which do not challenge ostensive judicial competence.

However, a detailed study of the sheriff's powers in the compulsory hospitalisation of the mentally ill<sup>26</sup> highlighted a number of issues. It is argued that the court's insistence on continuing to view powers of this sort as being "administrative" in nature must be criticised. The continuation of an arcane, obsolete distinction which is based on a tradition established in the eighteenth century is unhelpful. Attention should instead be focused on improving decision taking procedures and the quality of sheriff court adjudication. Indeed, a number of serious concerns became apparent, although the court process was, in general terms, felt to be the most suitable method of decision taking. There was concern that shrieval

adjudication could be avoided at the pre- hearing stage, that patients could be "steamrollered" into hospitalisation, that legal aid and representation was not always available, that shrieval adjudication could be viewed as a "rubber stamp" for medical recommendations, and that patients could be unnecessarily intimidated by the shrieval hearing itself. It is submitted that, taken together, these points indicate that there is no room for complacency as regards the current system: indeed, it can be argued that in some respects the sheriff court process has fallen short of providing a sensitive, yet effective, safeguard for the civil liberties of patients. Sheriffs and the government should give attention to these difficulties as a matter of urgency.

The sheriff's powers as an "higher governmental authority" proved to be more contentious. It was argued that, under the protasis/apodosis mechanism established in chapter nine, higher governmental functions were potentially more likely to challenge the standards of ostensive judicial impartiality and competence (and therefore the ideal of the rule of law) than other statutory appeals. The discussion in chapter twelve established the point that the potential for challenge has been realised, and that from a theoretical standpoint alone, higher governmental powers deserve strong criticism.

The study of appeals concerning parental choice of school<sup>27</sup> took the debate further, by illustrating the point that failure to meet the standards of ostensive judicial impartiality and competence in legislation has serious practical consequences. There was confusion, dissatisfaction and uncertainty amongst sheriffs regarding the range of their discretion under statute, with different sheriffdoms adopting completely different interpretations of the same appeal provision. This meant that different

education authorities have had to adopt different policy approaches, and that parents in neighbouring local authority areas see similar appeals being decided in completely different ways. It is therefore submitted that higher governmental powers should be viewed as encouraging an unwelcome confusion and uncertainty for all concerned, and that, on practical as well as theoretical grounds, there can be no justification for the continuation of this category of appeals.

The third category - the sheriff as a "civil judge" - served as a contrast to higher governmental powers. The distinction made by the protasis/apodosis mechanism indicated that, although sheriffs may be empowered to consider the merits of local authority decisions, civil judicial powers were unlikely to challenge the standards of ostensive judicial impartiality or competence, and therefore the ideal of the rule of law. This analysis was borne out in chapter thirteen, using general discussion and a detailed study of the sheriff's powers under assumption of parental rights legislation.<sup>28</sup> Accordingly, there can be no real concern that it is inappropriate or unsuitable, in terms of the general principles of the rule of law, for sheriffs to hear appeals of this nature.

The fieldwork findings did, however, raise a number of issues, which were similar to those which had become apparent in the study of compulsory hospitalisation of the mentally ill: there was concern that adjudication could be avoided at the pre-hearing stage, that parents were intimidated by the hearings themselves, and that legal aid and delay could become unfair hurdles for the parents in particular. Although the recent Child Care Law Review<sup>29</sup> has reported on some of these issues, it is once again submitted that the court process as it stands at present leaves much

to be desired. A more coherent, imaginative and sensitive approach is required from sheriffs and the government in particular. Failure to address these issues would be deplorable.

The final category - the sheriff as an "administrative judge" - is potentially very significant. General discussion and a detailed study of the operation of s.39 of the Licensing (S) Act 1976<sup>30</sup> established the point that, although sheriffs are required to operate in areas which have the potential for a strong "direct political involvement" and polycentric effect, the provisions in question do not challenge ostensive judicial impartiality or competence. The grounds of review are limited in such a way as to make the sheriff's statutory function very similar to that which is performed by the Court of Session in common law judicial review. Notwithstanding a few difficulties relating to the hearing of evidence, the limited grounds of review promote certainty in decision taking for sheriffs, local authorities and individual appellants, and do not challenge the ideal of the rule of law.

To conclude, a number of suggestions can be made. The continuation of the sheriff's jurisdiction in local administration as it is presently constituted cannot be supported. First instance executive powers which are contrary to the standard of ostensive judicial competence should not be continued; and the continuation of the administrative/judicial distinction in important areas such as mental health law is, in itself, pointless and anachronistic. Whilst civil judicial powers should be supported, and, if necessary, increased, higher governmental functions, which challenge the ideal of the rule of law, should be viewed as being highly undesirable and, on both practical and theoretical grounds, unsuitable for allocation to judges and courts.

Finally, it is submitted that - rather than continuing the tradition of higher governmental powers - the sheriff's function as an administrative judge could perhaps be developed as an alternative. Sheriffs would therefore be left with duties which could be categorised as being either those of a civil judge, or those of an administrative judge: the ideal of the rule of law would no longer be challenged, and local authority decisions would be subject to an appeal on their merits when appropriate (ie civil judicial appeals), or judicial review (ie either special statutory appeals to the sheriff acting as an administrative judge, or common law judicial review in the Court of Session). Accordingly, appeals could be made to sheriffs in areas with the potential for a strong direct political involvement and polycentric effect (such as parental choice of school), but the sheriff's remit would be limited to the legal and jurisdictional review of an administrative judge. In other areas, such as assumption of parental rights, which do not have the same potential for a strong direct political involvement or polycentric effect, the sheriff's statutory remit to consider the merits of an authority's decision would remain as it is at present. The effect of these suggestions would, it is contended, go a considerable way towards resolving the confusion, uncertainty and anachronism which at present surround the sheriff's functions in local administration.

## **FOOTNOTES AND APPENDICES**

**Footnotes: Introduction**

1. In particular since the creation of the accelerated procedure for judicial review (Rule of Court 260B) by Act of Sederunt in 1985: see for general comment Bradley, "The Scope of Judicial Review", published in a collection of papers presented at the Senate Hall, Old College, University of Edinburgh on 8th May 1989.
2. The Laws of Scotland: The Stair Memorial Encyclopaedia, Volume One, para. 210.
3. Scottish Law Commission Memorandum Number 14, Remedies in Administrative Law, para 10.2.
4. See below at pp.168-178 and subsequently chapter 12.
5. See below at pp.162-168 and subsequently chapter 11.
6. See below at pp.136 et seq for discussion of this term.
7. See below at pp.182-185 and subsequently chapter 14.
8. For a detailed discussion of these categories, see chapters eleven and twelve below.
9. For a detailed discussion of these categories, see chapters thirteen and fourteen below.
10. As in the recent case Rodenhurst v. Chief Constable, Grampian Police, 1992 SLT 104.
11. Principally "Scottish Local Authorities and the Sheriff", 1984 Judicial Review, p.63; "Administrative Appeals to the Sheriff" (1985) (unpublished); and "Administrative Appeals to the Sheriff: Statutory Title-Confering Formulae" (1987) (unpublished).
12. As in Macphail, Sheriff Court Practice, (1988), chapter 27.
13. Ibid.
14. E.G. Mental Health (S) Act 1984 (c.36), s.18; Social Work (S) Act 1968 (c.49), s.16; Education (S) Act 1980 (c.44), s.28 (as amended); Housing (S) Act 1987 (c.26), s.129; Clean Air Act 1956 (4 and 5 Eliz 2) (c.52), s.12(3).
15. (c.36), and see detailed discussion at chapter 11 below.



16. (c.49), and see detailed discussion at chapter 13 below.
17. (c.44), and see detailed discussion at chapter 12 below.
18. I.E. between Allen and Sons Billposting Ltd v. Edinburgh Corporation, 1909 SC 70 and Rodenhurst v. Chief Constable Grampian Police 1992 SLT 104. See also discussion below at pp.158-159.
19. E.G. Civil Judicial Statistics Scotland 1984, Scottish Courts Administration (1985) para 3.14, and Civil Judicial Statistics Scotland 1984-1988, Scottish Courts Administration (1991).
20. Cmnd. 3248 (1967).
21. Ibid, para. 263.

**Footnotes - Chapter One**

1. See pp.42-43 below.
2. Donoughmore Committee on Ministers' Powers Cmnd 4050 (1932), pp. 73-74.
3. My quotes, but see Griffith and Street, Principles of Administrative Law (1973) pp. 140-144.
4. Jennings, "The Report on Ministers' Powers", (1932), 10 Public Administration, pp. 345-348.
5. See for example The Report of the Committee on Administrative Tribunals and Enquiries Cmnd 218 (1957), paras. 262-277; and Cane An Introduction to Administrative Law (1987) pp. 18-20.
6. The degree of importance attached to distinguishing decision-taking functions has been reduced. (See Ridge v. Baldwin [1964] AC 40 at 63-81, per Lord Reid; and (in a Scottish context concerning the powers of the sheriff in local administration) Brown v. Hamilton District Council 1983 SLT 397 at 414 per Lord Fraser of Tullybelton).
7. See for example Bradley "Administrative Law", The Laws of Scotland: The Stair Memorial Encyclopaedia (Volume One) (1987) paras. 206-212; Cane supra at note (5); and Austin (1980) Book Review, 96 Law Quarterly Review, 297 at 298.
8. Judges are not usually required to take decisions of this sort: however, it is important to note that sheriffs are - see chapter twelve below for a detailed discussion.

It is recognised that the term "direct political involvement" is potentially contentious. Hopefully, the sort of criticisms levelled against Griffith's use of the term "political" to mean "controversial legislation or controversial action initiated by public authorities or which touch important moral or social issues" (Griffith, (1979) "The Political Constitution", 42 MLR, pp.17-19) have been avoided. Harlow and Rawlings are correct to point out that "Arguably any action becomes controversial once it is contested." (Harlow and Rawlings, (1988) Law and Administration, p. 319).

The term "direct political involvement" implicitly stresses two points. First, the degree of "direct political involvement" is relative to the degree of policy and political content inherent in the individual public authority decision which is the subject of appeal to the court: if the latter is high, then so is the former. It is recognised that determining whether a decision has a high degree

of policy and political content is ultimately a subjective area: the importance of what is termed "ostensive judicial impartiality" as a standard for distinguishing (albeit in general terms) between provisions which involve a strong "direct political involvement" and those which do not is developed a length below (see eg pp.32-44). Second, it is argued that the degree of "direct political involvement" is inevitably heightened if the authority concerned is an elected authority. This contention corresponds with Griffith's argument for open government (made in the context of his attack on calls for a Bill of Rights for the UK), which implicitly recognised the dangers inherent in involving the judiciary too closely in politics:

"... I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. ... A further advantage in treating what others call rights as political claims is that their acceptance or rejection will be in the hands of politicians rather than judges and the advantage of that is not that the politicians are more likely to come up with the right answer but that, as I have said, they are so much more vulnerable than judges and can be dismissed or made to suffer in their reputation. Not only am I very strongly of the opinion that, in the United Kingdom, political decisions should be taken by politicians, I am very strongly against further judicialisation of the administrative process." (see Griffith *ibid*)

9. For reasons of space, comment is relatively brief, but (hopefully) plain.
10. The term "justiciable" is used in a wide sense to denote whether or not judicial adjudication is suitable as a decision taking process. The difficulty inherent in attempting to arrive at more specific tests of justiciability is considered by Marshall, in "Justiciability", Oxford Essays in Jurisprudence, (1961), (Ed. Guest), pp.265-287. See also Harlow and Rawlings, Law and Administration (1988) pp.313-315.
11. Fuller, "Collective Bargaining and The Arbitrator" (1963) *Wisconsin Law Review*, 3; an almost identical formulation is used in "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353 at 364 and 369; see also Jowell below at note 12.
12. Jowell, "The Legal Control of Administrative Discretion", (1973) *Public Law*, p.178 at 195.
13. Fuller, (1978), *supra* at note 11, p.365 *et seq*; Jowell, (1973), *ibid*, p.195.
14. Jowell, (1973), *supra* at note 12, p.195.
15. See The Report of the Committee on Administrative Tribunals and Enquiries, Cmnd 218 (1957), para. 41. This approach has, however, been heavily

criticised. See for example Harlow and Rawlings, supra at note 8, pp. 96-98.

16. Jowell, (1973), supra at note 12, p.196; and Fuller (1978), supra at note 11, 369-370.
17. The depoliticising nature of adjudication generally has frequently been commented upon in the context of tribunals. For example, see Prosser, "Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and their Predecessors", (1977), 4 BJLS 39 at 42-44; see also Stevens on the depoliticising effect of judicial involvement in decision-taking at pp.39-40 below.

The independence of Scottish judges is protected by a series of ad hoc statutory provisions and conventions.

For a brief general discussion, see Paterson and Bates, The Legal System of Scotland: Cases and Materials (1986) pp. 169-175. For criticisms of (i) the judicial selection system, see Campbell, (1973), "Judicial Selection and Judicial Impartiality", Juridical Review pp. 254-280; (ii) judicial immunity from suit, see Brazier, "Judicial Immunity and the Independence of the Judiciary", 1976 Public Law; and (iii) judicial interventions in policy, see Stevens (at pp.39-40 below), who points out that judicial immunity from criticism depends to a large extent on the exclusion of the judiciary from consideration of contentious political issues. See more generally, Cotterrell, (1984), The Sociology of Law: An Introduction, pp.245-249.

British judges tend to the view (sometimes in a rather bombastic fashion) that the tradition of protecting judicial independence is of fundamental importance: see for general examples, Hewart, (1929), The New Despotism, chapter VII; Denning, "The Independence and Impartiality of the Judges" (1954) SALJ, 345; Elwyn-Jones "Independence of the Judiciary" (1976) Malaya Law Review, viii; and Hailsham at p.37 below.

18. Weiler, "Two Models of Decision-Making", (1968), 46 Canadian Bar Review 406 at 410: "The first characteristic of "adjudication" is that it has the function of settling disputes (between private individuals or groups, or the government and the individual). These disputes are not future orientated debates over general policy questions ... rather ... [they] involve "controversies" arising out of a particular line of conduct which causes a collision of specific interests. There is no logical or factual necessity about the proposition."
19. See Weiler (1968) ibid; and Jowell (1973) supra at note 12 p.196.
20. Harlow and Rawlings, (1988) supra at note 8, pp. 18-19.
21. Dicey, (1885), The Law of the Constitution, (10th Edition), (Ed Wade), (1959),

- pp. 187-96. Further reference is made to Dicey below, especially at pp.20-21.
22. Hewart (1929), supra at note 17, chapter II.
  23. Hayek, (1944), "The Road to Serfdom", chapter VI. In championing the rule of law, Hayek implicitly lays great weight on court-based adjudication, and the independence of the judiciary. The relationship between adjudication and the rule of law is discussed more fully at pp.34-35 below.
  24. Supra at footnote (11).
  25. Ganz (1974) Administrative Procedures, pp. 1-2: "... an administrative decision is not a narrow contest between two parties but determination of what ought to be done in the public interest in a particular case".
  26. It is, however, a highly restricted discretion: see pp.36-38 below.
  27. Jowell (1973), supra at note 12, p.180.
  28. Dworkin (1977) Taking Rights Seriously, p.31.
  29. Galligan, Discretionary Powers, (1986), pp. 20-22; and 68-84.
  30. Davis, Discretionary Justice, (1969), pp. 29-30, neatly illustrates how confusion between "arbitrary" and "discretionary" power can arise. Hewart, (1929), supra at note 17, chapter IV, exemplifies the point that failure to recognise a distinction results in sweeping, polemical arguments.
  31. Galligan, (1986) supra, at note 29, pp. 20-22.
  32. Galligan, (1976), "The Nature and Function of Policies within Discretionary Power, Public Law, p. 332 at 333.
  33. Galligan, (1976), ibid, p.334 et seq. N.B. Galligan's use of the term "individuation" is a highly specific one; see Galligan ibid , at footnote 8.
  34. With the "standard" frequently equated with "arbitrary" decision taking; see Hewart (1929) supra at note 30.
  35. Unger, (1976), Law in Modern Society, p.177; as quoted by Loughlin, (1978), "Procedural Fairness: A Study of the Crisis in Administrative Law Theory", 28 University of Toronto Law Journal, pp. 240-241 at footnote 128.
  36. Fuller, (1978), supra at note 11, pp. 394-404.
  37. Fuller, (1978), ibid, pp. 395.

38. Fuller, (1978), ibid, p.397-398.
39. Griffith implicitly makes this point in the context of his opposition to a Bill of Rights; see Griffith (1979), "The Political Constitution", 42 MLR 1, pp. 16-19. See also Stevens, pp.39-40 below.
40. Galligan, (1986), supra at note 29, p.216.
41. Scarman, (1974), English Law - The New Dimension, Part III.
42. Scarman, (1974) ibid, p.50.
43. See Scarman (1974), ibid, pp. 35-50. Statutory right of appeal lies to Supplementary Benefit Appeal Tribunals, rather than to the courts. The Labour Party in particular has traditionally been supportive of the allocation of decision-taking functions to tribunals rather than the judiciary in social policy areas: see Banting, (1979), Poverty, Politics and Policy: Britain in the 1960s, pp. 50-54 for a general discussion of this point in the context of Rent Assessment Committees.
44. Scarman (1974), ibid, p.50.
45. Scarman, (1974), ibid, p.49.
46. Scarman, (1974), ibid.
47. Scarman, (1974), ibid.
48. Harlow and Rawlings, (1988), supra at note 8, p.60.
49. My italics around "public interest". See for general discussion of judicial role Griffith, (1977), The Politics of the Judiciary, chapter nine. See Devlin, (1978) "Judges, Government and Politics", 41 MLR 501 for another viewpoint. Jowell illustrates the problem that polycentric elements can cause for all adjudicators (and not simply judges): Jowell (1973), supra at note 12, p.199 and pp. 213-215.
50. Scarman, (1974), supra at note 41, p.86.
51. See discussion below at pp.32-34.
52. Griffith, (1977), supra at note 49, pp. 208-209; Griffith (1979), supra at note 39, p.14, where reference is made to "The illiberal instincts of judges". The social homogeneity of Scottish judges has been commented on by Willock, (1969), "Scottish Judges Scrutinised", *Judicial Review*, 193; and more recently by Styles (1988) "The Scottish Judiciary, 1919-1988", *Judicial Review*, 41.



For a wider comment on judicial background see Paterson, (1983), "Becoming a Judge", in The Sociology of the Professions, (Eds. Dingwall and Lewis).

53. See for example Forsyth (1988), "The Provenance and Protection of Legitimate Expectations", Cambridge Law Journal, pp. 240-241 et seq.
54. Devlin, (1976), "Judges as Lawmakers", 39 MLR, p.7.
55. See discussion below at pp.28-34.
56. Scarman, (1974), supra at note 41, pp. 49-50. This implication was probably unintentional: see McAuslan (1975) "English Law and Social Policy", Symposium based on the 1974 Hamlyn Lectures, pp. 20-24. McAuslan was concerned with Scarman's comments on the environment (see Scarman, (1974), ibid., pp. 51-60) but his general argument that there are fundamental gaps in Scarman's approach is highly relevant. See also Griffith (1977), supra at note 49 pp. 187-192.
57. See argument below at pp.32-34.
58. Dicey, (1885), supra at note 21, Part Two, pp. 183-206.
59. Jennings, (1967), The Law of the Constitution, pp. 54-60; Robson, (1928), Justice and Administrative Law, 2nd Edition (1947), p.343 et seq.
60. Wade, in Dicey, (1885), Introduction to the Study of the Law of the Constitution, supra at note 21, pp. xcvi-cl. Wade is generally sympathetic to Dicey, but nonetheless draws attention to his failings.
61. Mayhew, (1984), The Rule of Law. This is a Conservative Political Centre publication.
62. Jowell, in Jowell and Oliver, (1985) The Changing Constitution, p.4, 18.
63. Dicey, (1885), supra at note 21, pp. 187-196.
64. Jennings, (1967), supra, at footnote 59.
65. For a good general discussion see McEldowney, (1985), "Dicey in Historical Perspective - A Review Essay", in Law Legitimacy and the Constitution (Eds. McAuslan and McEldowney), Chapter two.
66. Davis, (1969), supra at note 30, pp. 31-32.
67. See Davis, (1969), ibid., Wade (1969), supra, at note 60; McEldowney, (1985),

supra at note 65 (especially pp. 53-60).

68. Although Hayek was not concerned with the legal technicalities of Dicey's theory, he referred to Dicey's work as the "classical exposition"; see Hayek, (1944), supra at note 23, p.72, footnote 1.
69. Hayek (1944), ibid, pp. 72-73, 75-77.
70. It may be more accurate to say that Hayek's arguments were more cogent and better expressed. Hayek, (1944), ibid, p.79.
71. Hayek, (1944), ibid, pp. 75-76, 81-84, 86-87.
72. Davis (1969), supra at note 30, pp. 32-33. In fairness to Hayek, Davis' own mode of expression is also rather extreme. See also Hayek, (1944), supra at note 23, pp. 76-79.
73. See footnotes 28, 29 and see also Davis at note 30 supra.
74. Hayek, (1944) supra at note 23, chapter VI generally.
75. This is discussed at length in the context of the United States; Davis (1969), supra at note 30, pp. 32-44.
76. Raz, (1977), "The Rule of Law and its Virtue", 93 Law Quarterly Review p.195. See for a brief general comment, Turpin, (1988), British Government and the Constitution, pp.53-54.
77. Raz, (1977), ibid, pp. 195-196. For an alternative approach see Marsh (1968). "The Rule of Law as a Supra-National Concept", in Oxford Essays in Jurisprudence (First Series) (Editor A G Guest), chapter IX.
78. Raz, (1977), ibid, pp. 195-196.
79. Raz (1977), ibid, p. 198.
80. Raz (1977), ibid, pp. 198-202: Raz goes beyond making a simple list and sets out the main features of these principles.
81. Raz (1977), ibid, pp. 202-203. Arbitrary power is not confused with discretionary power.
82. Raz (1977), ibid.
83. Raz (1977), ibid, p.202.



84. Raz (1977), ibid, p.203.
85. Raz (1977) ibid, p.203.
86. Raz (1977), ibid, especially pp. 210-211.
87. Raz (1977), ibid, p.204.
88. See for example of wide ranging discussion of modern positivism, Lloyd and Freeman, (1985), Lloyd's Introduction to Jurisprudence, chapter six.
89. Raz, (1977), supra at note 77, pp. 205-208.
90. Raz (1977), ibid, p.208.
91. Raz (1977), ibid.
92. Raz (1977) ibid, pp.206 and 211.
93. Raz (1977), ibid, p. 206.
94. Raz (1977), ibid, p.198.
95. MacCormick, (1981), "Law, Morality and Positivism", 1 Legal Studies p.132.
96. See generally Fuller, (1969), The Morality of Law; and Cotterrell, (1989), The Politics of Jurisprudence, pp. 129-144.
97. Dicey has traditionally been associated with laissez-faire liberalism; see Jennings (1967) at footnote 59 supra. Hayek's championing of liberalism is self evident; see Hayek, (1944), supra at note 23, chapter VI in particular.
98. MacCormick, (1981), supra at note 95, p. 143.
99. Raz, (1977), supra at note 76, p. 196.
100. Raz, (1977), ibid, p. 198.
101. It is possible to make this claim whilst acknowledging that there may still be abuses of the ideal of the rule of law in Scotland: it would be quite wrong to claim that the ideal has been realised fully.
102. Miers and Page, (1990), Legislation; provides a good general discussion of the legislative process.
103. Bradley, (1987), supra at note 7, paras. 249-284; provides an authoritative

statement of the law relating to natural justice in Scottish administrative law.

104. See Bradley, (1987), ibid pp. 59-196; the "Administrative Law" title is the most comprehensive and detailed comment on Scottish administrative law.
105. Raz, (1977) supra, at note 76, p. 201. There is an independent prosecution service in Scotland (see generally Moody and Tombs (1982) Prosecution in the Public Interest); a highly developed criminal law (see generally Gordon, (1978), The Criminal Law of Scotland); and a complex law of evidence (see generally Wilkinson, (1986), The Scottish Law of Evidence).
106. There is comparatively little comprehensive material on the independence of the Scottish judiciary, but see Paterson and Bates, (1986) at footnote 17 supra for a brief discussion; together with Willock, (1969); Styles (1988) and Paterson (1983), all supra at footnote 52. See also Campbell (1973) at note 17 supra. It is not being claimed that the current arrangements which protect judicial independence are wholly satisfactory: the criticisms of Campbell (1973), ibid, are recognised fully (for further comment, see <sup>note 121</sup> pp. below). Nonetheless, it is contended that, subject to Griffith's arguments noted supra at footnote 52, the arrangements do ensure a high degree of judicial independence: for strong (and occasionally rather extreme) support of this see Denning, Elwyn-Jones and Hailsham at footnote 17 supra.
107. Raz, (1977), supra at note 76, p.201
108. Raz, (1977), ibid, p.195.
109. Raz, (1977), ibid, p.211.
110. Subject to the same comment as in footnote 101 supra.
111. General warnings against ignoring the historical and practical context of the rule of law are implicit in a variety of different works: these can be viewed as reminders of the danger involved in over-abstraction. See for example Fuller (1978); supra at note 11, pp. 372-375; Davis, (1969), supra at note 30, p. 33, p. 50; Jowell, (1985), supra at note 62, p.19. It is possible to appreciate the point that the rule of law is rather more significant than an arid theoretical criterion without necessarily taking the view (as implied by Fuller) that the rule of law represents an essential "internal morality" of law, without which law ceases to be law (see for a good general discussion of "internal morality" Cotterrell, (1989), supra at note 96, pp. 136-138).
112. See the general point made above and footnotes 102, 103, 104, 105 and 106 for illustrations of the Scottish position.
113. More specifically, "primary morality" should not be confused with Fuller's

"internal morality", which provides a natural law criterion for deciding whether law is law properly so called. (see generally, Fuller, (1969) and Cotterrell, (1989) supra, at footnote 96).

114. Raz, (1977), supra at note 76, p. 211.
115. Raz (1977), ibid, p. 210.
116. Raz (1977), ibid, p. 211.
117. I.E. Judicial adjudication is like a vending machine which mechanically produces a decision. See Jennings (1932), "The Report on Ministers' Powers", 10 Public Administration 333 at pp. 345-346, which was a powerful critique of the attempt made by the Donoughmore Committee Report on Ministers' Powers to delineate the judicial role.
118. See footnote 113 supra.
119. For an excellent and very full discussion of the basic theories of Hart and Kelsen see Lloyd, (1990), supra at note 88, chapters 5 and 6.
120. For an interesting discussion of the pervasive effect of Dicean ideas in UK public law see McAuslan and McEldowney (1985) in Law, Legitimacy and the Constitution (Eds McAuslan and McEldowney) pp. 1-38. On the basic positivism of the legal profession (i.e. the profession's tendency to view its activities as being separate from wider concerns of politics and morality) see Shklar, (1964), Legalism, pp. 2-3.
121. The word "ostensive" is used to denote "manifestly or directly demonstrable"; see Shorter Oxford English Dictionary (1973) (OUP). The idea is developed from Campbell (1973), supra, at footnote 17, who quotes from Eckhoff, "Impartiality, Separation of Powers and Judicial Independence", Volume 9, Scandinavian Studies in Law, p. 11. Use is made of the term "ostentatious impartiality" (see Campbell, (1973), ibid, pp. 257 et seq.) to mean much the same thing as what I have referred to as "ostensive impartiality". The term "ostentatious" is, it is submitted, something of an infelicity (see Shorter OED ibid, "characterised or marked by ostentation" (i.e. "false show, mere show, appearance")), as it implies a bogus or vulgar display.
122. See pp.11-12 and note 8 supra.
123. See for example Devlin, (1976), supra at note 54, p.16.
124. See below at pp.39-40 for example of Restrictive Practices Court.
125. See above at pp.31-32.

126. See discussion of Hayek and Raz above pp.21-29.
127. See above at pp.15-15, and pp.11-12 and note 8.
128. N.B. My quotation marks.
129. For example, see Hailsham below at p.37. Learning how to operate these mechanisms is a vital stage in the socialisation of any lawyer. They are presented at an early stage as a system to be learnt and a device which makes law intelligible and capable of application to specific issues. The emphasis on the impartial, objective and positivistic nature of these mechanisms has the effect of buttressing both the ethos and the standards of secondary morality.
130. Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374, at 410-411 per Lord Diplock.
131. Raz, (1977), supra at note 76, p. 211.
132. Raz, (1977), ibid, p. 208.
133. See above at pp.11-12 and note 8.
134. MacCormick, (1981), H.L.A. Hart, p.130.
135. MacCormick, (1981), ibid pp. 128-130 generally.
136. Hailsham, (1978) The Dilemma of Democracy: Diagnosis and Prescription, pp. 106-107.
137. See MacCormick, (1981), supra at note 134 pp. 129-130. MacCormick notes that "So the idea that judges have only a "weak" discretion since their task is to "find" the right priority ranking of legal principles and deduce from it the right answer is utterly unsustainable".
138. Paterson, (1982), The Law Lords, pp. 127-128 gives a detailed description of the problems which can arise for a judge faced with a "hard" decision. Jowell provides a clear statement distinguishing "strong" and "weak" discretion (see Jowell, (1973), supra at note 12, pp. 179-180).
139. See above at pp.11-12 and note 8.
140. On the Restrictive Practices Court see Stevens, (1964), "Justiciability. The Restrictive Practices Re-Examined", Public Law 221. On sheriff see below parts three and four.
141. Stevens, (1964), ibid, pp. 232-235.

142. Stevens, (1964), ibid, p. 252.
143. Stevens, (1964), ibid, p. 255.
144. Stevens, (1964) ibid.
145. See generally Devlin, (1976), supra at note 54.
146. Devlin, (1976), ibid, p.8.
147. See above at pp.11-12 and note 8.

**Footnotes: Chapter Two**

1. See supra at p.2.
2. Cotterrell, (1989), The Politics of Jurisprudence, especially pp. 85-87.
3. The tradition of deductive reasoning in Scots Law can be traced back to Stair; see Stair (1693), The Institutions of the Law of Scotland, (1981 edition), (Ed. Walker), "Introduction", (by D M Walker), pp. 37-41, and see generally pp. 17-28.
4. See Cotterrell, (1989), supra at note 2.
5. See argument advanced above at pp.27-36.
6. Raz, (1977), "The Rule of Law and its Virtue", 93 Law Quarterly Review, p.211.
7. This thesis is concerned with legislation which provides for judicial powers of decision taking in local administration. The general nature of the "conflicting interests" was discussed above at p.7 and pp.30-31.
8. This general premise is in accordance with the quotation from Griffith concerning the accountability of elected politicians set out at footnote 8, chapter one.
9. See above at pp.11-12 and footnote 8, chapter one. The expression "direct political involvement" is used frequently throughout the chapter. It is not intended to provide a footnote at every reference.
10. See discussion above at pp.39-40.
11. Particular attention is given to elected authorities. This is for two reasons. The main one is simple: statutory appeals to the sheriff are (with a few exceptions) made from the decisions of elected local authorities. The second follows from the quotation from Griffith noted supra at footnote 8, chapter one, and the discussion on the maintenance of ostensive judicial impartiality set out supra at pp.32-34.
12. For a detailed discussion of this provision see chapter 13 below.
13. Which may affect the legal or jurisdictional validity of an authority's decision.
14. For a detailed discussion of this type of application, see chapter 14 below.

15. See ibid note 14.
16. A classic example of "careful judicial decision taking" can be found in Lord Diplock's re-formulation of the grounds of judicial review, which, whilst both useful and clear, avoids any concern that ostensive judicial impartiality has been challenged. See Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 per Lord Diplock at pp. 408-413.
17. This point is implicit in Jowell, (1973), "The Legal Control of Administrative Discretion", Public Law at pp. 196-198 - "The Merits of Adjudication". See also MacCormick, (1978), Legal Reasoning and Legal Theory, pp. 14-15; and Mullan, below at footnote 25.
18. It is worth noting that the problems caused by delay were recognised in the administrative law context by the establishment of the accelerated procedure for judicial review under Act of Sederunt (see generally SI 1985 No. 500 (c.48); Page, (1984), "Just and Reasonable", SLT (News) 290; Lyall, (1985), "Judicial Review: the New Procedure" 30 JLSS 356; Burns, (1985), "Spotlight on Judicial Review", 107 Scolag Bulletin 121). The problems caused by expense and the availability of legal aid are discussed below at pp. 217-220 and 282.
19. See MacCormick, (1978) supra at note 17. For an excellent brief discussion of the "problems of proof", see pp. 87-93; and for a more detailed discussion, see Eggleston, (1983) Evidence, Proof and Probability chapters 2, 3 and 5.
20. This can be a disadvantage, but it can also be an advantage, see Jowell, (1973), supra at note 17, pp. 198-200, for a good itemisation of the main disadvantages of adjudication. Weiler, (1968), as noted supra at footnote 18, chapter one.
21. There is extensive literature on this point. See for general examples Rosenthal, (writing from a US perspective) Lawyer and Client: Who's in Charge, chapter 4, pp. 109-112 and chapter six; Cotterrell, (1984), "The Sociology of Law", pp. 188-206; Bankowski and Mungham, (1976) Images of Law, pp. 94-100.
22. MacCormick, (1976), supra at note 17, provides a good general discussion of "high standards" - in this example the requirement of adherence to the principles of formal justice - that judicial adjudication upholds (see pp. 73-86).
23. See discussion above pp.15-16, and 34-35.
24. Fuller, (1978), "The Forms and Limits of Adjudication", 92 Harvard Law Review, pp. 394-398: subject to the caveat on p.398 that; "... if judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process as a whole is able to absorb .... covert polycentric elements".



25. This is based on a loose adaptation of Mullan's "spectrum" theory, which seeks to determine when the restrictions of procedural fairness and natural justice should apply in decision taking. See Mullan, (1975), "Fairness: The New Natural Justice?", 25 University of Toronto Law Journal 281 at 300: "... the nearer one is to the type of function requiring straight law/fact determinations and resulting in serious consequences to individuals, the greater is the legitimacy of the demand for procedural protection but as one moves through the spectrum of decision making functions to the broad, policy-orientated decisions exercised typically by a minister of the Crown, the content of procedural fairness gradually disappears into nothingness, the emphasis being on a gradual disappearance not one punctuated by the unrealistic impression of clear-cut divisions..."
26. See Mullan, (1975), ibid.
27. It should not be forgotten that other institutions (most obviously statutory tribunals) may be adjudicatory in nature: "ideal type" adjudication is simply a term used to indicate that the court process is the ideal: see supra at pp.13.
28. And also the rule of law: see supra at pp.34-34.
29. See below at pp.197-204.
30. See supra at p.25.
31. Discussion of these issues frequently takes place in the context of the debate over the advantages and disadvantages of tribunals. Harlow and Rawlings, (1988), Law and Administration, pp. 71-78 provide a brief but interesting discussion of the pressures and assumptions which can be behind government decisions on the allocation of functions to tribunals which are ostensibly based on cost, access, formality etc. See also chapter one, footnote 43.
32. See discussion, supra at pp.31-32; and for a useful and concise "standard" treatment of statutory interpretation see generally The Law Commission and Scottish Law Commission: The Interpretation of Statutes, (HMSO, 1969) (see also Anonymous, (1967), "Statutory Interpretation" SLT 243).
33. On the "intention of Parliament" generally, see Cross, (1976) Statutory Interpretation, pp. 34-41; and Payne, (1956), "The Intention of the Legislature in the Interpretation of Statutes", 9 Current Legal Problems, 96.
34. See discussion, supra, at pp.31-36.
35. This point is implicit in MacCormick's discussion of statutory interpretation: "so far as concerns the "rules of interpretation" the burden of this chapter so far has been to indicate that ... there is a presumption in favour of applying



statutes in their more "obvious" meaning; and that at all events a fairly rigidly observed obligation only to give decisions which can be justified under some ruling which is compatible with some sense which is without excessive violence to understood linguistic usage ascribable to relevant statutory provisions. Within that limit, ..., reasons of consequence and principle can justify resort to less obvious meanings. To advert to the "golden rule" or to the "mischief rule" in such contexts is simply to express in terms of standard justifying reasons the justification for departing from the more obvious meaning - namely, so as to avoid interpreting the Act in a way which will give rise to some "absurdity" (the golden rule), or in a way which will defeat the actual objective of the legislation to remedy some "prior" mischief or defect in the law". MacCormick, (1976), Legal Reasoning and Legal Theory, pp. 207-208: see generally on statutory interpretation, pp. 203-213.

36. MacCormick makes this point, albeit in a different context - see MacCormick, (1981), HLA Hart, p.130.
37. See supra at p.2; see below at chapter 12 for a detailed discussion of examples.
38. See footnote 138, chapter one for a definition of this term.
39. See chapters 9 and 12 below for detailed discussion.
40. Subject to the general point made by MacCormick that "judicial discretion only exists within the framework of some predetermined standards"; see op cit (1981) at footnote 36 supra. For examples of this type of power see detailed discussion below at chapter 12.
41. It is appreciated that the careless use of the term "controversy" can be controversial: see on Griffith, Harlow and Rawlings, (1988), op cit at note 31 supra, p.319.
42. R. v. National Insurance Commissioners [1972] AC 914 at 1005 per Lord Diplock. For a clear and concise general discussion of "purposive" arguments, see Miers and Page, (1990) Legislation, pp. 170-183.
43. See MacCormick, (1976), ibid, pp. 206-207 for a good statement of the "two requirements to be met by lawyers who seek to persuade a court to adopt a less than obvious meaning for statutory words": these provide a brief but clear description of the constraints within which the judge must make his interpretation. The point under discussion is a variant of Paterson's analysis of the "conflict" between "Justice and Certainty" in the development of the common law - see Paterson (1982), The Law Lords, pp.122-132.
44. This general point was made above in discussion: see pp.36-38.

45. "To put it at its very lowest, there are ... strong pressures - apparently very effective pressures - on judges to appear to be what they are supposed to be. The reasons they publicly state for their decisions must therefore be reasons which (so far as taken seriously) make them appear to be what they are supposed to be: in short, reasons which show that their decisions secure "justice according to law", and which are at least in that sense justifying reasons". - see MacCormick (1976), *ibid*, p. 17 in the course of a discussion of the "justificatory function of legal argumentation" pp. 13-18. The way in which a judge arrives at his decisions must also "make them appear what they are supposed to be".
46. Mandla v. Dowell Lee [1983] QB.1; the case concerned the question of whether a Sikh could be viewed as being a member of a "racial group" under s.1(1)(b) of the Race Relations Act 1976. Lord Denning in particular made eclectic use of dictionary sources. See [1983] QB 1, especially pp. 9-10; reversed by Lord Fraser of Tullybelton [1983] 2 AC pp. 560-565. Lord Fraser went on to make a number of other serious criticisms of the Court of Appeal judgement, in particular statements made by Oliver L.J. and Kerr L.J. at pp. 567-568.

**Footnotes: Part Two: Chapter Three**

1. See for general example, Vile, (1967), Constitutionalism and the Separation of Powers.
2. See for a general example of this approach Bradley, (1988) "Administrative Law", in The Laws of Scotland: Stair Memorial Encyclopaedia (Volume One) paras. 201-345.
3. Although it is recognised that there is a strong tradition of empirical study in administrative law (for an example of a classic empirical study in the administrative law context, see Adler and Bradley (Eds.), (1975), Justice, Discretion and Poverty), it is contended that the dominant tradition of administrative law scholarship in the UK has been an analytical, "blackletter" law approach (see Partington, (1985), "The Reform of Public Law in Britain: Theoretical Problems and Practical Considerations", in Law, Legitimacy and the Constitution, (Eds. McAuslan and McEldowny), p.208).
4. See pp.2-6 supra.
5. See for example pp.206-208 below.
6. For example, the recent case of Rodenhurst v. Chief Constable, Grampian Police 1991 SLT 104 made reference to the 1908 decision of Allen and Sons Billposting Ltd v. Corporation of Edinburgh, 1909 SC 70, and see also discussion at pp.158-159 below.
7. See chapter nine below.
8. See Cooper of Culross, (1958), "Introduction to Scottish Legal History", The Stair Society, Volume 20 chapter one; and Paton, (1958), ibid, chapter two: Cooper and Paton were the most influential "Dark Age" scholars. Sellar, (1991), "A Historical Perspective", The Scottish Legal Tradition (Ed. Styles), pp. 29-30 warns against Lord Cooper's tendency to exaggerate the element of change and underplay the element of continuity.
9. Darnton, (1984), The Great Cat Massacre.
10. Darnton, (1984), ibid, p.14.

**Footnotes: Chapter Four**

1. Milne (1958), "The Sheriff Court Before the 16th Century", Stair Society Volume 20, p.350.
2. The term "governmental" is (at this stage) used generally to mean non-judicial functions held in local administration. Its meaning is developed throughout the thesis - see p.63 and p.107 below.
3. Dickinson, (1928) the Sheriff Court Book of Fife, pp. xi, xii.
4. Milne, (1958), op cit at note 1 supra p.350.
5. Milne, (1958) ibid, p.351: a survey of the apparently ineffectual legislation passed by the Scottish Parliament is given.
6. Caithness in 1719 and Elgin in 1726, Scottish Record Office (SRO) file SRO, GD 157/2248, noted in Whetstone, (1981), Scottish County Government in the Eighteenth and Nineteenth Centuries, p.120, note 14.
7. See generally Milne, (1958), op cit at note 1 supra p.352.
8. Malcolm, (1958) "The Sheriff Court: The 16th Century and Later", Stair Society Volume 20 p.356; and Whetstone, (1981) op cit at note 6 supra pp. 5-6; and p.122, note 38.
9. Acts of the Parliament of Scotland, i., 492a; and see Milne, (1958), op cit at note 1 supra p.351; and Whetstone, (1981), op cit at note 6 supra pp. 5-6; and p.122, note 38.
10. See generally Malcolm, (1958), op cit at note 8 supra pp. 356-360; Whetstone, (1981), op cit at note 6 supra, pp. 1-3.
11. Linklater and Hesketh, (1989), For King and Conscience, pp. 70 et seq.

12. Union with England Act 1706, (c.7): the ratification of Article XX and the amendments made to it are noted at APS, xi, 383.
  
13. Whetstone, (1981) op cit at note 6 supra, p.3.
  
14. Although it is not completely clear how direct an influence this was on the government: compare Malcolm, (1958), op cit at note 8 supra p.360, with Whetstone, (1981), op cit at note 6 supra p.4.
  
15. It would have been surprising if it had been. Montesquieu's famous and influential championing of the doctrine of the separation of powers in L'Espi des Lois was not published until 1748. For a brief discussion of the significance of Montesquieu's ideas see Montesquieu, "The Spirit of the Laws, (1975 Edition) (Editor Neumann), pp. li-lix.
  
16. For an interesting general discussion of the reformation and the Scottish "Enlightenment", see Camic, (1983), Experience and Enlightenment. Camic links the enlightenment with the Calvinist reformation - see especially pp.98-111.

**Footnotes: Chapter Five**

1. Heritable Jurisdictions (S) Act 1747 (20 Geo 2) (c.43).

N.B. It would appear that there is a some confusion in the recording of this important statute. The Chronological Table of the Statutes (HMSO) (1992) notes at p.104 that the Act was passed in 1746. However, the statute book itself makes it clear that the Act was passed in 1747 - (see 1747 (20 Geo II) (c.43)). The Act has traditionally been referred to in texts and other sources as an Act of 1747: accordingly, notwithstanding the Chronological Tables, it is intended to continue this practice. The date for the implementation of the changes was set out in s.3.

2. Ibid, at note one, s.1.
3. Ibid, at note one, ss.3, 5.
4. Ibid, at note one, s.5.
5. The duties of the High Sheriff were never defined. Green's Encyclopaedia of the Laws of Scotland Volume 13 (1931) noted at p.522 that the duties of the High Sheriff fell to be performed by the Sheriffs Depute and the Lords Lieutenant. However, The Third Report on the Sheriff and Commissary Courts (Parliamentary Reports, Law Commission of 1815) could not trace the functions of the High Sheriff; see pp. 7 and 8. See also The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 5, (1987), para.547:

The Act also introduced a considerable degree of confusion regarding the correct titles of the new officials. Sheriffs depute were frequently referred to unofficially as "sheriffs principal", (ie the pre-reform title of the High Sheriffs) in order to differentiate them from the substitutes, who were informally known as "sheriffs". To confuse the issue further, deputes were also referred to as "sheriffs" after the Circuit Courts (Scotland) Act 1828 (c.29), s.22. The matter was not resolved until the Sheriff Court (Scotland) Act 1971 (c.58), s.4(2), when sheriffs depute were finally re-named "sheriffs principal", and the title "sheriff substitute" was replaced by "sheriff". To avoid confusion in discussion of the period before 1971, the titles "depute" and "substitute" are used when appropriate, and "sheriff" is used to denote either rank.

6. See for example pp.75-91 below.
7. Heritable Jurisdictions (S) Act 1747, op cit at note 1 supra, s.24.
8. Ibid, at note (7).

9. Ibid, at note (7).
10. This is implicit in the provision noted ibid at note (7). See Whetstone (1981) Scottish County Government in the 18th and 19th Centuries at p.89, and p.123 at notes 58-61 for an informative discussion of shrieval practice. See also Sheriffs (S) Act 1747 (21 Geo 2) (c.19), ss.10, 11 for prohibition of other work.
11. The Heritable Jurisdictions (S) Act 1747, supra at note (1) had provided that appointments were ad vitam aut culpam after seven years in office. The Sheriff (S) Act 1755 (28 Geo 2) (c.7) postponed appointment ad vitam aut culpam for 15 years.
12. Whetstone, (1981), supra at note 10, chapter one generally, gives an interesting account of the sheriff's role in local administration in the period 1747-1880. However, there is very little comment on what is, to the eyes of a modern lawyer, the unusual nature of shrieval functions in local administration - in addition there is no analysis of case law. For discussion of these points see below.
13. See Heritable Jurisdictions (S) Act 1747, supra at note (1), ss.24, 30.
14. Bankton, (1752), Institutes of the Laws of Scotland, Book IV, Tit. XIV, p.551.
15. See Heritable Jurisdictions (S) Act 1747, supra at note (1), s.30.
16. See supra at p.59.
17. The Heritable Jurisdictions (S) Act 1747, supra at note (1), s.24 provided that deputed could appoint substitutes to assist them. For the position prior to the 1747 Act, see Malcolm, (1958), "The Sheriff Court: 16th Century and Later", Stair Society Volume 20, p.356.
18. See Whetstone, (1981), supra at note 10 pp. 5-8.
19. See Shaw (1983) The Management of Scottish Society 1707-1764, chapter two generally and pp.41-42.
20. Whetstone, (1981) supra at note 10, pp. 6-8.
21. Whetstone, (1981), supra at note 10, p.8 notes the influence of Henry Dundas in the changes. For a general discussion of the activities of Dundas, see Murdoch, (1980), The People Above, pp.128-131; see also Ferguson (1978), Scotland: 1689 to the Present, pp. 236-243.



22. Malcolm, (1958), "The Sheriff Court: The Sixteenth Century and Later", Stair Society Volume 20, p.361.
23. See Malcolm, (1958) ibid. The "local ties" of the depute were still a contentious issue in the mid 1960s - see Report of the Grant Committee on the Sheriff Court, Cmnd. 3248 (1967), para. 355. It should also be noted that a reasonably effective system of appeals was necessary, as a depute for a large sheriffdom could have had difficulty in the carrying out all his functions even in a 4 month period: Erskine, (1773), Institutes, p.58-60, gives an idea of the sizeable nature of the sheriff's functions.
24. Clark, (1824), The Office of Sheriff, p.257.
25. Clark, (1824), ibid.
26. See below at p.151
27. Whetstone, (1981) supra at note 10, chapter one generally.
28. I.E. beyond the provision that the sheriff depute could appoint substitutes to assist him; see Heritable Jurisdictions (S) Act 1747, supra at note (1) s.24.
29. See Whetstone (1981), supra at note 10, pp.9-17 for detailed discussions see also Malcolm, (1958), supra at note 22, pp. 361-362 for a more concise statement.
30. See discussion below at p.124.
31. Reports of the Commissioners Appointed to Inquire into the Courts of Law in Scotland, 1869-1871, (5 Reports).
32. Ibid., First Report pp., 6, 22.
33. The "local influences" were dwelt on by Clark (1824), supra at notes (24) and (25).
34. The depute's sheriffdom was usually a county (and sometimes more than one), where as the substitutes were allocated individual court districts within the sheriffdom.
35. "... frequently the sheriff principal [the depute] is appointed on merely political considerations, with but little practical knowledge of law [and] it may well be doubted whether, on the average, the sheriffs who sit on appeal are superior in legal attainments" - see, supra at note 31, First Report, p.3.
36. See, supra, note 31, First Report, p.11.



37. See ibid, First Report, pp. 154, 115.
38. See, ibid, First Report, p.188.
39. See, ibid, First Report, p.115.
40. See, ibid, First Report, p.154.
41. Not everyone was impressed by the substitutes' performance: for example, see ibid, First Report, p.204.
42. See Green's Encyclopaedia of the Laws of Scotland, Volume 11, (1889), p.323.
43. See for example Hume v. Swinton, Faculty Decisions, February 7th 1806, A sheriff's decisions were subject to review if he had acted beyond his jurisdiction: see Leishman v. Magistrates of Ayr, Faculty Cases, 8 March 1800.
44. Sometimes also referred to as "exclusive and final" jurisdictions: Millar v. Henderson, 1869, 6 SLR 368 illustrates the point that the remit of these jurisdictions was interpreted strictly: see p.370 per Lord President; and see Leith Police Commissioners v. Campbell, 1866, 5 M. 247, for a "final and privative" provision.
45. <sup>?</sup>  
~~For example,~~ Appeal from the sheriff to the Outer House was competent under burial ground legislation: see Campbell v. Dunlop and Wilkie, 1864, 2M 503, per Lord President at pp. 505-506.
46. See e.g. Hume v. Swinton noted supra at note 43. "He [i.e. the sheriff] is the King's officer ... He does not act under the authority of the Court of Session ...."
47. EG - see above at pp.58-61 and below at pp.76-82.
48. Love v. Lang (1872) 10 M 782: see below at note. 53
49. See Lord Deas' comments below at pp.73-74.
50. Accordingly, if there was no provision for appeal, the decision could be viewed as having "none of the characteristics of an ordinary judicial process", see Dubs v. Police Commissioners of Crosshill (1876) 3 R 758 at 761, per Lord Ormisdale.
51. See supra at note 48.
52. See Home v. Swinton, supra at note 43.

53. Love v. Lang, supra at note 48, p.768 per Lord President (Inglis).
54. Love v. Lang, supra at note 48, p. 787.
55. Love v. Lang, supra at note 48, per Lord Cowan at p.787.
56. See supra at note 44.
57. See supra at note 44 per Lord Justice Clerk Inglis at p.251.
58. Campbell v. Dunlop and Wilkie, supra at note 45, and Fulton v. Dunlop, 1862, 24D 1027.
59. Fulton v. Dunlop, supra at note 58 per Lord Deas at p.1033.
60. I.E. in Campbell v. Dunlop and Wilkie, supra at note 45, pp. 507-508 per Lord Deas.
61. See generally Little and Godwin, (1988), "History of Local Government", The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 14, paras. 20-22, 23-29.
62. See supra at pp.11-12 and footnote 8, chapter one; also pp.49-53.
63. See generally supra at pp.31-38 and pp.49-53.
64. See supra at pp.52.
65. Green's Encyclopaedia of the Laws of Scotland, Volume 13, (1931), p.518.
66. Apart from the different Law Commission reports, there are case reports, sheriff court practice texts, the institutional writers, the entries in the three editions of Greens Encyclopaedia of the Laws of Scotland (i.e. 1899, 1914 and 1931), and a number of other secondary sources. Reference is also made to primary sources stored at the Scottish Record Office (SRO). The SRO maintains a large holding of sheriff court records, which are indexed under SRO SC/1 to SC/70. The sources date from the eighteenth century to the 1960s. Much of the material is of limited interest, and its nature and content varies considerably from court to court. The sheriff court books and holdings of club registers provide only the most basic information (ie names and addresses of parties, date of hearings etc.): good examples of each category are the summary applications "B" registers for Cupar Sheriff Court 1949-1956 (SRO SC/20/8- 7), and the club registers for Glasgow Sheriff Court 1958-1963 (SRO SC/36/26-9). It is worth noting that the sheriff clerks tended to record all court business in the ordinary court book (with exceptions such as fiars and electoral business) until the late 19th century, at which point the

larger courts split their registers into ordinary court ("A" registers) and summary applications ("B" registers): the majority of governmental applications are noted in the "B" registers. A citation prefixed by "SRO" denotes a Scottish Record Office file.

67. See generally, Little and Godwin (1988), supra at note 61, paras. 20-22, 31-37.
68. Supra, note 31, First Report, Minutes of Evidence paras. 105-107.
69. Sheriffs were also entrusted with a wide range of functions concerning local police forces; see Police (S) Act 1857 (20 and 21 Vict) (C.72), ss.6, 3 for general examples of the sheriff's statutory functions.
70. Supra, note 68 for example.
71. Bankton, (1752) Institutions of the Law of Scotland, Book IV, p.557. See also the record of monthly fiars business held for Perth Sheriff Court for the period 1791-1821 at SRO/SC.49/22-3 to 7. There is also a graph showing the fluctuations in fiars prices between 1790-1862 at SRO/SC.49/22-8. It is clear from the files that striking the fiars was a complicated and time consuming undertaking.
72. Bankton, Ibid, at note 71: see also Chisholm, Sir Walter Scott as a Judge, p.63; and Law Commission Report of 1818 (Report No. 3), p.10.
73. Bankton, (1752) supra at note 71.
74. Knox and Company v. Law and Others, (1771), December 10th, Morison's Dictionary 4420: The Sheriff of Haddingtonshire had adopted a new procedure, which was challenged unsuccessfully in the Court of Session.
75. See, supra, at footnotes 43 and 46.
76. See above at p.71.
77. McGlashan, (1868), Sheriff Court Practice, p.8. Previous editions of his book (i.e. 1842 and 1854) provide further illustration of the point that there had been little change.
78. See for general discussion, Ferguson, (1984) "The Electoral System in the Scottish Countries before 1832" Stair Society Volume 35 - Miscellany II, (Ed. Sellar) p.261. The SRO has a very large holding of material relating to electoral administration. For example, the Freeholders' (i.e. electors') minutes for the period up to 1832 for the City of Edinburgh are stored at SRO/SC.39/91-9: the minutes give a record of the Freeholders' meetings, rolls of Freeholders, claims and objections to enrollment and the results of

elections. Files SRO/SC.6/84-5 covers the period 1832-1835 at Ayr Sheriff Court, and include a copy of the Representation of the People (Scotland) Act 1832 together with instructions for sheriff clerks. Most of the material is extremely mundane, and relates mainly to election expenses: however, it does give a flavour of the heavy workload which was involved in administering the electoral system.

79. Bankton, (1752) supra at note 71, Book IV, p.559.
80. Bankton, (1752) ibid, Book IV, p.454.
81. See Ferguson (1984), supra at note 78.
82. Gash, (1953), Politics in the Age of Peel, p.36.
83. Bankton, (1752) supra at note 71, Book IV p.457.
84. Representation of the People (Scotland) Act 1832 (2 and 3 William IV) (c.65).
85. Ibid at note (84), ss. XIV, XVII, XXII, XXIV, XXVII, XXVIII, XXIX.
86. Ibid at note (84), s.XIV.
87. "... under the Royal Burgh Reform Act [i.e. the Royal Burgh (S) Act 1833 (3 and 4 Will IV) (c.76)], the sheriffs in the Appeal Courts sitting on the Parliamentary registers, have a privative appellate jurisdiction in certain burgh electoral registers. Also, by other Acts [i.e. mainly the Burghs and Police (S) Act 1833, (3 and 4 will IV) (c.46)], passed to regulate these and other burghs of recent date, certain other powers, both ministerial and judicial have been committed to them". See McGlashan (1842), Sheriff Court Practice, p.11.
88. For example, as in the County Elections (S) Act 1853 (16 and 17 Vict) (c.28) s.2.
89. Bankton, (1752), supra at note 71, Book IV p.559.
90. Erskine, (1773), supra at note 23, p.60.
91. Supra at note 90 and see also McGlashan (1842), Sheriff Court Practice p.9.
92. Infefment Act 1845 (8 and 9 Vict) (c.35).
93. Service of Heirs (S) Act 1847 (10 and 11 Vict) (c.47).
94. Sheriff Court (S) Act 1853 (16 and 17 Vict) (c.80).

95. See generally, McGlashan, (1854), Sheriff Court Practice, p.8.
96. Whetstone, (1981), supra at note 10, p.61.
97. See generally, Green's Encyclopaedia of the Laws of Scotland Volume 4, (1914), p.554.
98. See Whetstone, (1981), supra at note 96.
99. See Commissioners of Supply Meetings (Scotland) Act (28 and 29 Vict.) (c.38). The Act made alternative provisions under s.2.
100. See below.
101. Whetstone, (1981), supra at note 10, p.80. See also Duties on Income Act 1799 (39 Geo 3) (c.13) s.23; and Duties on Income Act 1799 (39 Geo 3) (c.22), s.5.
102. House Tax 1803 (43 Geo 3) (c.161) s.7.
103. Taxes (S) Act 1812 (52 Geo 3) (c.95), ss.2, 3.
104. The main pieces of legislation in this period were the Burghs and Police (S) Act 1833 (3 and 4 Will IV) (c.46); the Burgh Police (S) Act 1847 (10 and 11 Vict.) (c.39); Police (S) Act 1850 (13 and 14) (c.33); and the General Police and Improvement (S) Act 1862 (25 and 26 Vict) (c.101).
105. See ibid at note 104.
106. See Burgh and Police (S) Act 1833 supra at note (104) s.xxv.
107. See 1833 Act, supra, at note (104), ss. cxxx; cxxxix-xci; xciii; xcvi; cxv-cxviii; cxii; cvii; xcvi; cxiii.
108. See 1833 Act, supra at note (104), s.cxxiv, xc; xciii; cxii.
109. See 1833 Act, supra at note (104), s.cxxxiv. The offenses were tried using a summary form established by the Circuit Courts (S) Act 1828 (9 Geo 4) (c.29).
110. Police (S) Act 1850 (13 and 14) (c.33): see long title of Act.
111. Ibid, ss. iv-xxx.
112. Ibid, ss.cix; cxx; cxxxii; cxxxv; clxu; ccxxvii; clxxxiii; ccxxxi; ccxliii; ccxlviii; cclviii.

113. Ibid, s.cclxv.
114. Ibid, s.cclxxviii; and s.cclxxix.
115. Ibid, s.cclxxxvi.
116. Ibid, s.cccxxx. The sheriff's signature was proof of confirmation (s.cccxxxv). N.B. Sheriffs also had extensive judicial powers under the Act: see for example the offenses listed under s.xcvi and s.clxxxix. See also generally Smeaton v. St Andrews Police Commissioners, 1867, 5 M 743, which considers the general question of the status of the activities approved by the sheriff (ie whether commissioners could ignore a decision which had been ratified by the sheriff).
117. Public Health (Scotland) Act 1867 (29 and 30 Vict) (c.101).
118. See generally Evans (1950), A Source Book of Administrative Law in Scotland (Ed. McClarty), p.133.
119. EG- ss. 22-26; see also the Public Health (S) Act 1897 (60 and 61 Vict) (c.38) below at pp.118-119.
120. See generally, Walker (1950), A Source Book of Administrative Law in Scotland (Ed. McClarty), pp. 197-200.
121. Whetstone, (1981) supra at note 10, p.81.
122. Highways (S) Act 1718, (5 Geo 1) (c.30), s.vi.
123. The sheriff's connections with the Commissions of Supply have already been noted: sheriffs were also ex officio justices of the peace: see McGlashan, (1868), Sheriff Court Practice, p.8. Whetstone (1981), supra at note 10, notes at p.84 that "the Lords of Justiciary were able to voice their complaints and give their orders to the reformed sheriffs. They were far more likely to listen to and report back orders than were the county gentlemen who happened to attend the circuit as jurors once in a while".
124. See for example, Local and Personal Acts (49 Geo III) 51, 52, 79, 84, 87, 89, etc.
125. Whetstone, (1981) supra at note 10, p.87.
126. Highways (S) Act 1845 (8 and 9 Vict) (c.41) s.xiii-xvi.
127. Roads and Bridges (S) Act 1878 (41 and 42 Vict) (c.51). See for example



s.124 (dealing with offenses under the Act); and s.104 (bye-laws made under the Act required approval of the sheriff).

128. See generally. Little and Godwin (1988), supra at note 61, para 34; and for a more detailed discussion of poor law administration see Cage, (1981), The Scottish Poor Laws 1745-1845, chapters 1, 2 and 3. SRO/SC./86-2 provides a basic record of all poor law applications made at Ayr Sheriff Court in the period 1854-1933: the applications were solely concerned with questions of legal entitlement for relief - see below at note 133.
129. Poor Law (S) Act 1845 (c.83).
130. See Little and Godwin, supra at note 128.
131. Poor Law (S) Act 1845, supra at note (129), s.11.
132. "... I think there could have been no meeting of the Board at which some question involving considerations of law did not occur. I relied mainly on the opinions of the sheriffs... I should have unquestionably felt myself greatly embarrassed ... if I had not had the advantage of such men as the sheriffs." see Report of the Commissions of 1869-71, paras. 10,372-10,381.
133. Poor Law (S) Act 1845, supra at note 129, ss.27, 73 and 77.  
N.B. The sheriff's jurisdiction did not include the power to fix the quantum of parochial relief - see Paton and Others v. Adamson, Morison's Dictionary p.7669 and 10577 (November 20th, 1772). See also Cage, supra at note 128 pp. 4-7. The sheriff was limited to deciding questions of legal entitlement.
134. Madhouses (S) Act 1815, (55 Geo 3) (c.69).
135. Ibid at note (134), ss. 3, 5, 7. See generally, Strang v. Strang (1849), 11 D 378 (license of sheriff required to set up asylum). Applications under the lunacy Acts were usually recorded in the ordinary court book along with other court business. However, the SRO holds mental health records for Edinburgh Sheriff Court for the period 1737-1855 in separate storage (in unindexed bundles). The majority of papers are only of limited interest in the context of this paper, as they tend to focus on whether a curator bonis is necessary, but there is interesting material covering hearings into the state of mind of the individuals concerned.
136. Ibid at note (134), s.8.
137. Ibid at note (134) s.10.
138. Ibid at note (134) s.13.

139. Lunacy (Scotland) Act 1857 (20 and 21 Vict)(c.71).
140. Ibid, at note (139) ss.xxiii, xxv, xxiv, xlv, lxxxv, lxxxvi, xcl, xcii. The scheme was continued under the Lunatics (S) Act 1858 (21 and 22 Vict) (c.89).
141. See Lunatics (S) Act 1858 ibid at note (140), s.1.
142. Lunacy (S) Act 1862 (25 and 26 Vict) (c.54).
143. Lunacy (S) Act 1862, ibid at note (142), ss 4-9, and 14-16. The ministerial nature of the sheriff's function was stressed in Beattie v. Gemmel, 1861, 23 D 386; 33J. 191 per Lord Cowan at p.397 (in Dunlop report).
144. Heritable Jurisdictions (S) Act 1747 (20 Geo 2) (c.43) s.xviii.
145. Prisons (S) Act 1839 (2 and 3 Vict) (c.42).
146. Ibid at note (145), s.1.
147. Ibid at note (145), s.2.
148. It should be noted that there was a great deal of co-operation between sheriffs, Commissioners of Supply and Prison Boards, emphasising once more the close links between the sheriffs and commissions: prisons and asylums were built using local taxation. See the Prisons (S) Act 1839 (2 and 3 Vict) (c.42) and the Lunacy (S) Act 1857 (20 and 21 Vict) (c.43) respectively.
149. Prisons (S) Act 1860 (23 and 24 Vict) (c.105).
150. Ibid at note 149, ss.xi, xiii, xlv.
151. See Prisons (S) Act 1877 (40 and 41 Vict) (c.53) ss.16 and 53; Capital Punishment Amendment Act 1868 (31 and 32 Vict) (c.24), s.11 and Debtors (S) Act 1880 (43 and 44 Vict) (c.34) s.10.
152. Public Records (S) Act 1809 (49 Geo 3) (c.42), s.10.
153. Registration of Births, Deaths and Marriages (S) Act 1854 (17 and 18 Vict) (c.80).
154. Ibid at note (153), s.xxi.
155. See generally Green's Encyclopaedia of the Laws of Scotland Volume 11 (1914) p.127. The SRO has an interesting holding from Aberdeen Sheriff Court. SRO/SC.1/70-1 provides copies of the sheriffs' reports on the state and



progress of public records in the sheriffdom for the period 1810-1874. The reports provide a clear picture of the extensive general duties held by the sheriffs.

156. Erection of Lighthouses Act 1786 (26 Geo 3) (c.101) s.1.
157. Scott, (1982), (Editor Laughlan) The Northern Lights, pages 9 and 11.
158. See discussion supra in section three. For an interesting and detailed study of social welfare and the voluntary principle in Scottish local administration, see Checkland (1980) Philanthropy in Victorian Scotland, chapter 23.
159. For an example of the restrictive franchise in burghal elections. at the end of the period under consideration, see the Municipal Elections (S) Act 1868 (c.108), s.3, which provided that those who were entitled to vote in the restricted parliamentary elections could also vote in municipal elections. See Representation of the People (S) Act 1868 (c.48), ss.3-6.

**Footnotes: Chapter Six**

1. Secretary for Scotland Act 1889 (48 and 49 Vict) (c.61). The holder was not a Principal Secretary of State until 1926 - see Pottinger, (1979), The Secretaries of State for Scotland 1926-76, Chapter III.
2. Pottinger, (1979), ibid, pp 6-13; see generally Laird, (1956), "The Office of Secretary of State", in A Source Book and History of Administrative Law in Scotland (ed. McLarty).
3. See Kellas, (1975) The Scottish Political System, Chapter 3, for general discussion.
4. See Local Government (S) Act 1889 (c.50); see for further comment Little and Godwin, (1988), History of Scottish Local Government", The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 14, para. 30; and Slevin, (1956) "Rural Administration" in A Source Book and History of Administrative Law in Scotland (ed. McLarty), p.17.
5. See in particular The Town Councils (S) Act 1900 (c.49) ss.5, 23; and Little and Godwin, (1988), ibid paras 21, 22.
6. See Little and Godwin, (1988), ibid paras 21, 22, 30, 38, 39 for a concise discussion.
7. For legislation relating to Parliamentary elections, see Representation of the People Act 1884 (47 and 48 Vict.) (c.3), ss.2, 3. Smout, (1986), A Century of the Scottish People, pp. 246-247, estimated that the 1884 Act left 40 per cent of the UK male population without a vote in 1911: (women were still denied the vote). See also the Representation of the People Act 1918, (7 and 8 Geo V) (c.64) ss.1-4 (introduced a less restricted male franchise, and an extremely restricted female franchise); and the Representation of the People (Equal Franchise) Act 1928 (18 and 19 Geo 5) (c.12) ss.1, 2 (assimilated a less restricted franchise for male and female voters). For legislation relating to local government elections see The Municipal Elections (Amendments) (S) Act 1881 (44 and 45 Vict.) (c.18), s.2 (women given restricted voting rights); Burgh Police (S) Act 1892 (c.66), ss.31, 17 (Parliamentary qualifications to vote extended to municipal elections); Local Government (S) Act 1889 (52 and 53 Vict) (c.50) s.28, 9 (unrestricted male franchise and restricted female franchise in Scottish counties); Representation of People Act 1918 (7 and 8 Geo 5) (c.64) ss.3, 43 (established new local government franchise, unrestricted for men, and restricted for women); Representation of People (Equal Franchise) Act 1928 (c.12) ss.2, 7 (removed restrictions for women).
8. For example, the development of an equal franchise only came about as the result of determined, and often courageous, campaigning by the suffragette

movement, see Ferguson, (1978), Scotland: 1689 to the Present, Volume 4, The Edinburgh History of Scotland, pp.350, 358.

9. See discussion in chapter one ibid at pp.20-21; and see generally Partington, "The Reform of Public Law in Britain", (1985), Law, Legitimacy and the Constitution, (eds. McAuslan and McEldowney); and Harlow and Rawlings, (1988), Law and Administration, pp.7-19.
10. On Dicey's influence in UK administrative Law, see generally McAuslan and McEldowney (1985), "Legitimacy and the Constitution: The Dissonance Between Theory and Practice", in Law, Legitimacy and the Constitution, ibid pp.3-5.
11. See Harlow and Rawlings (1988), supra, at note 9, pp.18-22 for an interesting general discussion of the development of the ideal of the "balanced constitution".
12. See Little and Godwin, supra at note 4, paras 38 and 39 for a summary of the position at the end of the period under consideration. See also supra at footnote 7 for a brief summary of legislation concerning the widening of the local government franchise.
13. 1898 Judicial Review p.359.
14. Ibid at note (13).
15. See for example Scottish Law Review Volume XVIII, (1892) pp.9-15 ("A sheriff-substitute is the leading man in his own jurisdiction, and he cannot very well maintain that position upon the income of the principal grocer or butcher." at p.13) for a note of the apparently meagre response of the Treasury. A further flavour of the internal politics involved can be found at Scottish Law Review Volume XVIII, ibid at pp.267-275.
16. Campbell, 1900 Juridical Review at p.18.
17. See discussion of Dicey's concept of the rule of law, supra at pp.20-21.
18. Cd. 8713 (1917); see also Himsworth (1979), 2 Urban Law and Policy, p.90.
19. Cd. 8713 (1917) ibid, pp.83-84.
20. Ibid at note 19.
21. Ibid at note 19.
22. Ibid at note 19.

23. Cmd.2801 (1927) Vols I and II. N.B. Volume II sets out the evidence presented to the commission. It is not recorded in some official indexes, but a copy is stored at the National Library of Scotland, Edinburgh.
24. See ibid at note 23 para.4401E (provides 1926/27 salaries of sheriffs and substitutes); and see also paras. 2512, 3218, 3609, 3636 and 3865 JI (on proposals re raising shrieval salaries).
25. See ibid at note 23 para. 3140 (37) and (31): see also para.4384.
26. Ibid at note 23 para.2512(ii).
27. Instead, comment was limited to rather petty questions of who (i.e. deutes or substitutes) did what in practice, how much work was involved, and whether local sheriffs were preferable to part-time Edinburgh practitioners as administrators - see for example the opposing views presented on the conduct of Parliamentary elections ibid at paras 776 and 1602.
28. See ibid para. 4014, E and F. N.B. Sheriff McClure also made a detailed statement, at para. 4015.
29. See, ibid at para. 1181 (N.B. - see also para. 698).
30. See, ibid, at para. 1303. It was noted in the Scots Law Times that "the evidence on this matter [ie the sheriff's administrative duties] reveals a wide divergeance of opinion even between those who have had the best opportunity of judging": 1926 SLT (Notes), p.94.
31. See ibid at para. 2634.
32. Supra at note (16).
33. See Cmd. 2801 (1927), para 2775C.
34. Ibid at para. 2775C.
35. See generally pp.42-43 supra
36. See generally pp.32-35 and chapter two supra.
37. See supra at note 23, Volume I of the Report, pp.393-400, especially p.400.
38. Allen and Sons Billposting Ltd v. Lord Provost, Magistrates and Town Council of the City of Edinburgh 1909 SC 70. The case was heard on Nov. 3 1908.

39. 1876, 3 R 412.
40. Ibid per Lord Mure, at 418-419.
41. Calder v. Trotter, June 8, 1833, 115694, 5 Scot Jur. 420.
42. Pollock v. Robertson, Nov. 12, 1833, 12514, 6 Scot Jur. 44.
43. McTavish v. Commissioners of Caledonian Canal, 1876, 3R 412 at 417.
44. Stirling and Ferguson v. Hutcheon and Others, 1874, 1R 935 at 942.
45. See for example Lindsay v. Magistrates of Leith 1897, 24R 867, per Lord President Robertson at 869, Lord Adair at 870, and Lord McLaren at 870-871.
46. 1874, 1R 935.
47. Ibid, per Lord Ardmillan at pp.942-943.
48. See discussion supra at pp.77-78.
49. Lindsay v. Magistrates of Leith, supra at note 45, per Lord McLaren at pp.870-871.
50. Magistrates of Glasgow v. Glasgow District Subway Co (1893) 21 R 52.
51. Ibid, per Lord President Robertson at 54.
52. 1876, 3R, 758.
53. Ibid per Lord Justice Clerk Moncrieff at 760.
54. Ibid per Lord Ormidale at 760.
55. Supra at note 45.
56. Per Lord Adair at p.870.
57. Supra at note 43.
58. Supra at note 44.
59. See for example Lord Adair at note 56 supra, and Lord President Robertson below at note 60.
60. This was the leading judgement. See note (45) supra per Lord President

Robertson at 869.

61. See for example, Glen v. Commissioners of Dumbarton, 1897 Sh.Ct Rep at pp.247-248 per Sheriff Lees; and Morgan v. Corporation of the City of Glasgow, 1899 Sh.Ct.Rep. at pp.43-44 per Sheriff Fyfe.
62. 1909 SC 70.
63. See pleas-in-law for the appellants number (1) at pp.72 and 73, which were upheld in all the judgements: see for example Lord Ardwall at p.77; and for quotation see Lord Low at p.76.
64. per Lord Low ibid.
65. See discussion at pp.13-14 supra.
66. Per Lord Low supra at note 63.
67. Ibid
68. Ibid
69. [1948] 1KB 223 per Lord Greene M.R. This should not, however, be viewed as being highly unusual, as a number of other cases of the same period set out various tests which sought to limit the discretion of administrative authorities. For example, Hunter v. Schoolboard of Lochgilphead 1886, 14R, 135 per Lord Young at 140 noted that the Court of Session possessed "a large discretionary power... to regulate the administration of the guardians of public property - the managers of public property - for the benefit of the community".
70. Per Lord Low, supra at note 63.
71. See supra at pp.11-12 and footnote 8, chapter one.
72. See supra at pp.15-16.
73. See supra at pp.31-32.
74. See supra at pp.32-35.
75. See supra at <sup>P. 75</sup>~~pp. 35~~.
76. Supra at note (61).
77. Morgan, supra at note 61, per Sheriff Fyfe at 44.

78. First published in SLT (1930) p.1. Reference is made to Cooper of Culross, (1957), Selected Papers, pp.26-38.
79. Lord Cooper was senior counsel for the City of Edinburgh: see footnote 62 supra.
80. Cooper, (1957), Selected Papers, pp.26-34: quotation is at pp.33-34.
81. Cooper, ibid, generally at pp.26-29.
82. Cooper, ibid, p.34.
83. Ibid.
84. See discussion above at pp.32-35.
85. At pp.17-19 above.
86. See for full statement of the sheriff's duties in this respect, Cmd.2801 (1927), para. 4014 E; and para 4407(iii). See also Green's Encyclopaedia of the Laws of Scotland, Volume 11, (1914) pp. 124-125; and the (1931) edition of Volume 13, pp.528-529.
87. The Scottish Record Office has an extensive holding of papers relating to the "Skye Expedition". See generally, The Scottish Home and Health Department files (SRO HH 1/1-306; /458-61; and /710-3). See also the Ivory Papers, at SRO GD 1/36.
88. The Secretary of State left direction of Government forces to Sheriff Ivory (see SRO HH 1/1-580), who later refused to agree with the Secretary of State that the disturbances had come to an end (see SRO HH 1/1-203).
89. E.G., Sheriff Ivory sought approval of the Secretary of State for the abandonment of the Chief Constable's plans to arrest the ringleaders of the dispute, arguing instead that it would be preferable to "boldly apprehend ... the deforcers openly and in daylight, with a sufficient force of Royal Marines or [armed] police" (see SRO HH 1/1-203).
90. Cmd 2801 (1927), para. 4014E.
91. Ibid. See also para. 4015 O, where Sheriff McLure made a rather curious statement: "In recent years - from 1909 till this moment - their duties in this particular case have been repeatedly discussed with the Scottish Office; and personal conferences with the General Officer Commanding were of course very numerous in 1921, and have occurred also in 1920 and 1925. Nothing more need to be said - or ought to be - on this department of the sheriff's



duties.

92. Ibid, para 1751.
93. Ibid, paras. 1192-1193.
94. See Cmd. 2301 (1927) para.4407 G (iv) for a full statement of their duties. See also the correspondence and papers relating to the difficulties of dividing sheriffdoms for local government elections in 1889 for an indication of the amount of work involved: SRO SC 39/92-6.
95. Ibid; and see comment by Sheriff Mackenzie at para. 4139: "Of course....., I cannot return 22 MPs and return their votes, so I have two myself and grant deputations to the sheriffs substitutes or other people for the rest. But at the same time, if any question of difficulty arises, it is referred to me."
96. See Little and Godwin, (1988), The Laws of Scotland: The Stair Memorial Encyclopaedia, Volume 14, paras. 39, 40 for a brief summary of the 1929 legislation.
97. (55 and 56 Vict) (c.55).
98. (3 Edw.7) (c.33).
99. Ss.9-15. Under the Town Councils (S) Act 1900 (63 and 64 Vict) c.49), the sheriff could delineate local government wards. See also the correspondence and papers at note 94 supra.
100. S.26.
101. Sheriffs had a number of other functions under the 1892 Act. See for example, ss.218, 78, 46, 49 and 262. it should also be noted that sheriffs frequently had duties placed on them under private and local legislation: see for example Sheriff Crole's impressive list for the Sheriff of Lothian and Peebles at Cmd. 2801 (1927), para.4041 F.21.
102. (53 and 54 Vict) (c.70).
103. Ibid, s.32. Reference was made to the Public Health (S) Acts 1867 (29 and 30 Vict) (c.101), ss.16, 18 and 19.
104. See (29 and 30 Vict) (c.101) ibid, s.19.
105. See (53 and 54 Vict) (c.70), s.35.
106. See supra at pp.99-100.

107. (15 and 16 Geo 5) (c.15).
108. (20 and 21 Geo 5) (c.40).
109. S.3.
110. (55 and 56 Vict) (c.55). For general comment, see Green's Encyclopaedia of the Laws of Scotland Volume 13 (1931) pp. 532-533.
111. S.22.
112. See ss.131, 122 and 38.
113. Ss.18 and 109.
114. S.32.
115. Burial Grounds (S) Act 1855 (18 and 19 Vict) (c.68); and (60 and 61 Vict) (c.38).
116. S.145.
117. For a brief discussion of the development of roads administration, see Little and Godwin, (1988), supra, para 33; and Green's Encyclopaedia of the Laws of Scotland, Volume 13 (1931) p.533.
118. Under the Local Government (S) Act 1889 (52 and 53 Vict) (c.50), ss.11(2), 16, 110.
119. 1909 (9 Edw 7) (c.47).
120. (15 and 16 Geo 5) (c.68).
121. See supra at note 118.
122. (41 and 42 Vict) (c.51).
123. Ibid ss.104 and 42-43.
124. Greens Encyclopaedia (1931) supra at note 117.
125. Ibid, (1931) at note 531.
126. Exchequer Court (S) Act 1856 (19 and 20 Vict) (c.56), s.29.
127. See Cmd. 2801 (1927), para. 4407 G (1)(a), (b), (c).

128. See Little and Godwin (1988) supra at note 4, paras 38 and 39 for changes brought about by 1929 Act.
129. When the Local Government (S) Act 1973 (c.65) came into effect: Local Government (S) Act 1973 (Commencement No.1) Order 1973, SI 1973/1885; Local Government (S) Act 1973 (Commencement No.2) Order 1973, SI 1973/2181.
130. Cmd 2801 (1927), para. 4407 G(i)(c).
131. Ibid (1927), para. 4014 E (4). See also memorandum presented by sheriff clerk of Midlothian on the practice of striking the fiars in the period 1921-1922: SRO SC 39/90-102.
132. Ibid (1927), para. 4407 G(vi)(L).
133. Ibid (1927) para. 4407 G(i)(g).
134. Ibid (1927), para. 4407 G(i)(e). Sheriff McLure provided a very long submission to the commission, stressing the responsibility of the deputed role: ibid (1927), para. 4015 J, K , L.
135. (8 Edw. 7) (c.63).
136. Ibid, s.8.
137. See for example supra at pp.119.
138. Licensing (S) Act 1903 (3 Edw.7) (c.25).
139. Ibid ss.79 and 81.

**Footnotes: Chapter Seven**

1. Cmnd. 3248 (1967).
2. The written and oral evidence submitted to the Committee is not available as a public record: accordingly, I have avoided identifying individual interviewees by name. I am grateful to the Scottish Courts Administration for allowing me to have access. The material is not indexed or stored in any particular order. Reference is made to original sources by file number (although there are different arrangements for oral evidence - see note 10 below). The files are held by the Scottish Courts Administration (SCA). The file cited is (SCA) File B/Law/29/8 A.2.
3. (SCA) File B/Law/29/1A at pp.2-3.
4. The substitutes presented a robust rejection of the depute's arguments in the Memorandum of the Council of Sheriff Substitutes: "... the part-time sheriffs' principal are only occasionally in the sheriffdoms and are not in touch with the daily business there: they are mainly engaged in conducting their own business in the Court of Session and do not exercise a continuous or general oversight. Furthermore, in sheriffdoms, the holder of the office of Sheriff Principal changes so frequently that he has little opportunity to become known to the sheriffdom." (see (SCA) File B/Law/29/8A, p.2).
5. Lillie, (1970) Tradition and Environment.
6. Ibid, p.222.
7. The written memorandum of evidence presented by the Sheriffs Depute is held by the Scottish Law Commission (SLC). I am grateful to the Scottish Law Commission for allowing me to have access to it. Sheriff Lillie's rather extreme views were commented on by Lord Stott (1991) Diaries of a Lord Advocate p.48.
8. Ibid, p.25.
9. Ibid.
10. Oral evidence presented to the committee is filed either according to its date, or according to the number of the meeting. The reference is to evidence presented by the sheriff's depute on 5th February 1965, p.20. Sheriff Depute "B" made what he admitted to be "cri de coeur for the present system". (see ibid p.21).
11. Cmnd. 3248 (1967), paras 352-356; and para. 263 (see also Appendix IX).

12. For discussion of this point, see below at p.186 . The evidence submitted by the Lord Advocate's Department acknowledged this point in File SCA B/Law/29/8-A 5(c).
13. Cmnd. 3248 (1967), para. 339.
14. Oral evidence, 11 Jan. 1965, p.33.
15. Cmnd. 3248 (1967), para. 339: this paragraph effectively doubts the rather bombastic estimation of the deputed' responsibility set out in their memorandum of evidence (stored at SLC).
16. File entitled "Second Meeting, para. 16.
17. File entitled "33rd Meeting".
18. Cmnd. 3248 (1967) paras. 277-279.
19. Oral evidence presented by sheriffs depute, 5th February 1965, p.19. N.B. The Report (Cmnd. 3248 (1967)) recommended the repeal of the sheriff's powers in relation to burial grounds (see paras 287-289).
20. Oral evidence presented by Faculty of Law, University of Glasgow, 17th May 1965, p.24.
21. Oral evidence presented by sheriffs depute, 5th February 1965, p.20.
22. Cmnd. 3248 (1967), paras. 263-268; 268-305; and 310.
23. Principally "The Limitations of the Judicial Functions of Public Authorities", in Cooper (1957), Selected Papers 1922-1954, pp.26-38. See also discussion above at pp.112-114.
24. Cmnd. 3248 (1967), para. 264.
25. Ibid, para.266; and Cmnd. 2021 (1963) (The Second Report of the Guest Committee on Scottish Licensing Law), paras. 102-105. See also file on material presented to the 37th Meeting of the Committee.
26. Cmnd. 2021 (1963) para. 105. See discussion below at chapter fourteen.
27. Cmnd. 3248 (1967), para. 267: and see Minutes of 33rd Meeting, para. 19.
28. Ibid para. 268.
29. Allen and Sons Billposting Ltd v. Lord Provost, Magistrates and Town Council

of the City of Edinburgh, 1909 SC 70.

30. See supra at note 23.
31. Glasgow Corporation v. Glasgow Churches Council 1944 SC 97.
32. Arcar v. Dunbartonshire County Council, 1948 SC 62.
33. See discussion above at pp.73-75 and pp.109-111.
34. See for general discussion above at pp.31-36, and pp.49-53.
35. Butler v. Corporation of the City of Glasgow (1931) 47 Sh. Ct Rep. 72.
36. Ibid at p.73.
37. (1939) 55 Sh.Ct. Rep. 104
38. Ibid at 110: see also Himsworth (1984), "Scottish Local Authorities and the Sheriff", Judicial Review at p.74.
39. 1944 SC 97.
40. See discussion below at pp.134-135.
41. 1944 SC 97-100.
42. Ibid, pp. 100-103 per Lord Ordinary (Patrick).
43. Ibid pp. 104-129 on a re-hearing per Second Division (Lord Justice Clerk Cooper, Lord Mackay and Lord Jamieson).
44. See generally discussion noted above at footnote (33).
45. 1944 SC p.101 per Lord Patrick.
46. Ibid p.102.
47. Green's Encyclopaedia of the Laws of Scotland, Volume 13, pp.517-535 (1931). (It is possible that Lord Wark's entry was based on Sheriff Crole's submission to the 1927 Commission on the Court of Session and Office of Sheriff Depute Cmd. 2801 (1927), para. 4041).
48. Ibid p.517.

49. 1944 SC p.103: Lord Cooper became Lord Justice Clerk in 1941 on the death of Lord Aitchison.
50. See above at pp.112-114 for a general discussion.
51. 1944 SC p.125 per Lord Justice Clerk Cooper.
52. Ibid.
53. Ibid p.126.
54. Ibid.
55. See generally citation at footnote 23 above.
56. See generally discussion at p.112 above.
57. 1944 SC pp. 115-123.
58. Ibid at p.120 per Lord Jamieson.
59. Lord Cooper became Lord President in 1946 on the appointment of Lord President Normand as a Lord of Appeal.
60. Arcari v. Dunbartonshire County Council, 1948 SC 62.
61. Ibid at p.66 per Lord President Cooper.
62. Some are stated explicitly, and others are implicit in the argument: see ibid at pp. 67-68.
63. See also Ross-shire County Council v. MacRae-Gillstrap 1930 SC 808 at 812 per Lord Sands.
64. 1944 SC at p.68.
65. See generally pp.170-172.
66. 1944 SC p.66.
67. Kaye v. Hunter, 1958 SC 208.
68. Ibid p.211.
69. Ibid.



70. For general discussion, see pp.132-135 above.
71. 1958 SC 211.
72. As set out by Lord Cooper in City of Glasgow v. Glasgow Churches' Council, 1944 SC pp. 125-128.
73. Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 229-234 per Lord Greene.
74. Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 at 410-411.
75. Indeed, he made no reference to the Glasgow Churches' Council case.
76. IE - The statutory provision in the Allen case expressly required the sheriff to consider the reasonableness of the Corporation's decision: see Allen and Sons Billposting v. Lord Provost, Magistrates, and Town Council of the City of Edinburgh, 1909 SC 70. See also discussion of Rodenhurst v. Chief Constable, Grampian Police, 1992 SLT 104 at pp.158-159 below.
77. 1958 SC p.211 per Lord President Clyde: this point is given full consideration in the discussion of the Rodenhurst case noted ibid.
78. Memorandum presented to the Grant Committee by the Sheriffs Depute (stored at SLC), p.17.
79. Cmnd. 3248 (1967), Chapter VIII and Appendix VIII: the evidence submitted to the committee also provides a considerable amount of detail, and reference is made to it below.
80. The main sheriff court practice text was Dobie (1948), Law and Practice of the Sheriff Courts in Scotland. Lord Wark's section in Green's Encyclopaedia of the Laws of Scotland, Volume 13, pp.517-535 also provides a clear picture of the extent of the jurisdiction at the beginning of the period under consideration.
81. Memorandum presented to the Grant Committee by the Sheriffs Depute (stored at SLC), pp.5-6. "When military forces require to be summoned to the aid of the civil power the requisition is made by the sheriff. It is the sheriff's duty to accompany the troops, ... read.... the Riot Act, and ..., request the troops to take action".
82. Cmnd. 3248 (1967), para. 354.
83. Public Order Act 1936 (26 Geo 5 and 1 Edw 8) (c.6), ss 2 and 8.
84. Licensing (S) Act 1959 (7 and 8 Eliz 2) (c.51), s.188.

85. Police (S) Act 1956 (4 and 5 Eliz 2) (c.26).
86. Ibid ss.4 and 34.
87. Ibid s.32.
88. Representation of the People Act 1949 (12, 13 and 14 Geo 6) (c.67).
89. Ibid s.17(e).
90. Lillie, (1970), Tradition and Environment, pp.237-241; and Memorandum presented to Grant Committee by the Sheriffs Depute (stored at SLC), para 4.
91. SCA File B/Law/29/17A pp.60-61.
92. Ibid.
93. Cmnd. 3248 (1967), para. 262.
94. Exchequer Court (S) Act 1856 (19 and 20 Vict) (c.56) ss.29-37.
95. Local Government (S) Act 1947 (10 and 11 Geo. 6) (c.43) (ss.300-301). The Memorandum submitted to the Grant Report by the Sheriffs Depute noted in this context that "... the loss of control by the sheriff of certain of the administrative functions of public authorities is, as the late Lord Cooper said in his essay on the subject, "deeply to be deplored.""
96. (10 and 11 Geo. 6) (c.43) ibid, ss. 131, 133, 136.
97. Ibid, s.53.
98. Ibid, s.147.
99. Burgh Police (S) 1892 Act (55 and 56 Vict.) (c.55).
100. Ibid, s.237.
101. Ibid, s.165.
102. Ibid, s.339.
103. Ibid, s.9.
104. As noted generally at Cmnd. 3248, Appendix VII, para. 176.
105. Public Health (S) Act 1897 (60 and 61 Vict) (c.38); and see generally Dobie,

(1948), Law and Practice of the Sheriff Courts in Scotland, pp.645-654.

106. (60 and 61 Vict) (c.38) ibid, s.111.
107. Ibid, s.39.
108. Ibid, s.94.
109. Ibid, ss.22-26.
110. Ibid, s.164.
111. Milk and Dairies (S) Act 1914 (4 and 5 Geo 5) (c.46), ss.7, 18, 24.
112. Slaughter of Animals (S) Act 1928 (18 and 19 Geo. 5) (c.29), s.2.
113. Burial Grounds (S) Act 1855 (18 and 19 Vict) (c.68), ss. 4, 10, 18, 24.
114. Ss. 31, 54, 61, 68, 72.
115. Clean Air Act 1956 (4 and 5 Eliz. 2) (c.52) s.12. N.B. The Chronological Table of the Statutes (HMSO) (1992) cites the year incorrectly.
116. Rivers (Prevention of Pollution) (S) Act 1951 (14 and 15 Geo. 6) (c.66), ss.11 and 20.
117. See discussion above at p.118 , and Dobie op.cit at note 105 supra, pp.599-602.
118. Housing (S) Act 1950 (14 Geo. 6) (c.34), ss.16, 114, 151, 165.
119. Housing (Repairs and Rents) (S) Act 1954 (2 and 3 Eliz 2) (c.50) s.18 (and see also s.21).
120. Housing and Town Development (S) Act 1957 (5 and 6 Eliz 2) (c.38), s.20.
121. Town and Country Planning (S) Act 1947 (10 and 11 Geo. 6) (c.53), ss.21, 38.
122. See generally, Little and Godwin, (1988), The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 14, para 33.
123. Roads and Bridges (S) Act 1878 (41 and 42 Vict.) (c.51). See also Dobie (1948), op.cit at note 105 supra, pp.662-665.
124. Ibid, s.43, Sched. C., ss.lxxx and xci.

125. Ibid, ss.39 and 44; Sched C, lxxxiii.
126. (14 Geo. 6) (c.24), s.12 (see also Road Traffic Act 1930 s.54).
127. (8 and 9 Eliz.2) (c.16), ss.99, 103, 145.
128. See above at pp.88-89, and p.120 for general discussion.
129. Mental Health (S) Act 1960 (8 and 9 Eliz.2) (c.61). See also Lillie (1970), op cit at note 5 supra p.196 for the strongly held views of Sheriff Depute Lillie.
130. Ibid, s.28-30.
131. Ibid ss.39, 40, 44.
132. Ibid, ss.48, 55, 56, 65, 66, 19.
133. Church of Scotland Courts Act (25 and 26 Vict) (c.57), s.2.
134. National Assistance Act 1948 (11 and 12 Geo. 6) (c.29), s.47.
135. Cmnd. 3248 (1967) para. 262.
136. Prisons (S) Act 1952 (15 and 16 Geo. 6 and 1 Eliz.2) (c.61), S.15.
137. See generally, discussion at pp.121-122 below.
138. Education (S) Act 1962 (10 and 11 Eliz.2) (c.47) - N.B. sheriffs depute were empowered to serve as Chairmen of Independent Schools Tribunals under s.113 and Sched. 7, Rules 4-5.
139. Ibid ss.38-39.
140. Ibid, s.64.
141. See above at pp.90-91 and p.121 for general examples.
142. Registration of Births, Deaths and Marriages (S) Act 1965 (c.49).
143. Ibid, s.42.
144. Ibid ss.16, 18, 25, 31 and 10.
145. Marriage (S) Act 1939 (2 and 3 Geo 6) (c.34), s.2; and Marriage Notice (S) Act 1878 (41 and 42 Vict) (c.43), s.10.

146. Licensing (S) Act 1959 (7 and 8 Eliz 2) (c.51), ss.169-176.
147. See above for general discussion at p.121.
148. S.64.
149. Betting, Gaming and Lotteries Act 1963 (c.2), Sched 1, para 24, 28, Sched 2, para 7, Sched 6, para 7, Sched 7, para 6.
150. See e.g. Pharmacy and Poisons Act 1933 (23 and 24 Geo 5) (c.25), ss. 21, 30; Pharmacy and Medicines Act 1941 (4 and 5 Geo 6) (c.42), s.2; Firearms Act 1937 (1 Edw 8 and 1 Geo 6) (c.12), ss.2, 8, 10, 21, 26; Nursing Homes Registration (S) Act 1938 (1 and 2 Geo 6) (c.73), s.3. This list is far from exhaustive - see Cmnd 3248 (1967) Appendix VIII>
151. Merchant Shipping Act 1894 (57 and 58 Vict) (c.60) ss.634-668.
152. NB - This document is stored at the Scottish Law Commission.
153. Stott, 1991, Lord Advocate's Diary, pp. 31-32, pp.54-60.

**Chapter Eight: Footnotes**

1. Cmnd. 3248 (1967).
2. Returning Officers (S) Act 1977 (c.14), s.1.
3. Local Government (S) Act 1947, s.301.
4. "Striking" the fiars was considered fully in a memorandum presented to the Grant Committee (SCA/B/LAW/29/8A), and the Report of the Committee recommended that "the annual striking of fiars prices in sheriff courts should cease": Cmnd. 3248 (1967), paras. 310-313.
5. Merchant Shipping Act (57 and 58 Vict) (c.60), s.668.
6. Licensing (S) Act 1976 (c.66), Part VII esp. ss. 104, 105, 108, 109, 110, 117.
7. Mental Health (S) Act 1984 (c.34), s.18; and see discussion below at chapter 11.
8. See above at pp.83-86 and pp.118-119 for general discussion.
9. Licensing (S) Act 1976 (c.66), s.39; and see discussion below at chapter 14.
10. Nursing Homes Registration (S) Act 1938 (1 and 2 Geo 6) (c.73), s.3.
11. Cinemas Act 1985 (c.13), s.16(1) (N.B. - see note to s.16 in Scottish Current Law Statutes).
12. Caravan Sites and Control of Development Act 1960 (8 and 9 Eliz II) (c.62), ss.7, 32, 8.
13. Housing (S) Act 1987 (c.26), ss. 111, 112, 129, 163, and 186.
14. Public Health (S) Act 1897 (60 and 61) (Vict c.38) ss.52, 54, 55.
15. E.G. Roads (S) Act 1984 (c.54), ss.1, 151, 13, 57, 63, 74.
16. Representation of the People Act 1983 (c.2), ss.56, 57; and see also Stewart, "A Survey of Electoral Registration Cases", 1980 SLT (News) 250.
17. Social Work (S) Act 1968 (c.49), s.16; and see discussion below at chapter 13.
18. Education (S) Act 1980, s.28 (as amended); and see discussion below at chapter 12.

19. See chapter five, footnote five.
20. Law Reform (Miscellaneous Provisions) (S) Act 1990 (c.40), s.35.
21. Brown v. Hamilton District Council, 1983 SLT 397 (HL).
22. Himsworth, "Scottish Local Authorities and the Sheriff", 1984 Juridical Review 63; "Administrative Appeals to the Sheriff" (1985) (unpublished); "Administrative Appeals to the Sheriff: Statutory Title - Conferring Formulae" (1987) (unpublished).
23. Himsworth, (1985), ibid, Appendix "A"; and Himsworth, (1987), ibid, pp.27-29.
24. Himsworth (1985), ibid, pp.7-45.
25. Himsworth (1985), ibid, pp. 47-47; Himsworth, 1984 JR, supra at note 22, pp. 80-86.
26. Himsworth (1985), ibid, pp.20-36.
27. See ibid: "restricted powers of review "A" and "B".
28. I.E. "restricted powers of review "A"", discussed by Himsworth (1985), ibid, pp.20-28.
29. I.E. "restricted powers of review "B"", discussed by Himsworth (1985), ibid, pp. 28-36.
30. See supra at note 28.
31. But only some: see <sup>above</sup>~~below~~ at pp.32-36 and 43-49.
32. See supra at note 29.
33. Himsworth, 1984 Juridical Review, supra at note 22, p.86.
34. Ibid.
35. Ibid.
36. Ibid.
37. Ibid.
38. Carvana v. Glasgow Corporation, 1976 SLT (Sh.Ct.) 3.

39. I.E. a provision which did not limit the sheriff's power of review: see Glasgow Corporation Consolidation (General Powers) Order Confirmation Act 1960 (8 and 9 Eliz 2) (c.3), s.95.
40. Carvana, supra at note 38, p.6.
41. Ibid.
42. Ibid at pp. 6-7.
43. See discussion supra at pp.137-139. Sheriff Macphail restated his case in Macphail, (1988) Sheriff Court Practice, paras. 26-06 to 26-11.
44. See discussion supra at pp.132-135.
45. See discussion supra at pp.109-111.
46. See especially at pp.168-172.
47. I.E. to other sheriffs. Clearly, his views expressed in Sheriff Court Practice, supra at note 43 would have no formal significance at all.
48. Hamilton v. Chief Constable of Strathclyde, 1978 SLT (Sh.Ct) 69 per Sheriff Stewart. See also Stuart, "Gun Law", 1980 SLT (News) 17 for comment on the Hamilton decision.
49. See discussion of Rodenhurst v. Chief Constable, Grampian Police, 1992, SLT 104 below at pp.159-159.
50. Himsworth, 1984 Juridical Review, supra at note 22, p.80. See e.g. Central Regional Council v. Barbour European Ltd 1982 SLT (Sh.Ct) 49.
51. Stuart, supra at note 48, p.17.
52. Supra at note. 48.
53. Ibid, pp. 69-71.
54. Ibid, at pp.71.
55. Ibid, at pp.69-71.
56. See discussion of Rodenhurst, (op.cit at note 49 supra) for further consideration of this point.
57. See Hamilton v. Chief Constable of Strathclyde, supra at note 48, pp.69-71:



Sheriff Stewart does not give explicit consideration to the issue of determining whether a "true lis" existed.

58. See for full discussion, pp.129-135 and pp.137-139 supra.
59. Hamilton, supra at note 48, pp. 69-71.
60. IE - their sphere of interest.
61. See Hamilton, supra at note 59.
62. I.E. in Kaye v. Hunter, 1958 SC 208 at 211-212: see also discussion above at pp.137-139.
63. I.E. in Glasgow Corporation v. Glasgow Churches' Council, 1944 SC per Lord Cooper at 125-126: see also discussion above at pp.132-135.
64. 1992, SLT 104.
65. See for counsels' submissions, ibid, at pp. 108-109.
66. Ibid, pp. 109-110.
67. Ibid.
68. I.E. in Glasgow Corporation v. Glasgow Churches' Council, supra at note 63.
69. I.E. in Carvana v. Glasgow Corporation, supra at note 38.
70. See for discussion of this aspect of Kaye v. Hunter, pp.<sup>136</sup>~~135~~-139 above.
71. Rodenhurst, supra at note 49, p.110.
72. I.E. in Arcari v. The County Council of Dunbartonshire 1948 SC, pp. 67-68: see discussion above at pp.135-137.

**Chapter Nine: Footnotes**

1. E.G. under Arbitration (S) Act 1894 (57 and 58 Vict.) (c.13), s.6 (as amended).
2. E.G. under Lands Clauses Consolidation (S) Act 1845 (8 and 9 Vict) (c.19).
3. E.G. Sheriffs Principal have ceremonial duties in connection with Royal visits. See Macphail, (1988), Sheriff Court Practice, para. 1-12, and para 1-18.
4. See generally discussion at pp.10-11 ibid.
5. I.E. p.196 et seq.
6. For an authoritative statement of summary applications procedure, see Macphail, at note 3 supra, paras 26-01 to 26-46.
7. E.G. appointment of members of local valuation appeal panels by sheriffs principal under Local government (S) Act 1975, s.4.
8. Per Lord Wark in Green's Encyclopaedia of the Laws of Scotland Volume 13, (1931) p.517; and cited with approval per Lord President Cooper in Glasgow Corporation v. Glasgow Churches' Council 1944 SC at 126.
9. I.E. in areas such as maintaining the peace, "striking" The fiars, electoral law, and mental health and prison legislation: see generally at pp.75-91; 115-121; 140-146 above.
10. Above at pp.150-151.
11. See below at p.164.
12. As in the recent case of T.F. v. Management Committee and Managers of Ravenscraig Hospital (I.H.) 1988 SCLR 327 at 335 per Lord McDonald.
13. Ibid.
14. See Macphail (1988), at note 3 supra, p. 26-32 to 26-34.
15. See chapter 11 below for a full discussion of this point.
16. Licensing (S) Act 1976 (c.66), Part VII, ss. 104, 105, 108, 109, 110, 117.
17. See full discussion below at pp.200-202.
18. For example, compulsory hospitalisation of the mentally ill under Mental Health (S) Act 1984 (c.36), s.18: see also full discussion below at pp.204-229.

19. See for example general discussion above at pp.81-86.
20. Cmnd. 3248 (1967), para 268. For an example of an important new style see appeals against school placing decisions under the Education (S) Act 1980 (c.44), s.28. Himsworth considered these appeals in "Administrative Appeals to the Sheriff", (1985), (unpublished), when he discussed "restricted powers of review "A"" at pp. 20-28. School placing appeals are also discussed in detail at pp.241-257 below.
21. I.E. under Lord Cooper's judgement in Arcari v. Dumbarton County Council, 1948 SLT 438; as followed in Rodenhurst v. Chief Constable, Grampian Police, 1992 SLT, pp. 108-110.
22. See for example discussion of school placing appeals at pp.241-257 below.
23. Subject to judicial review under the supervisory jurisdiction of the Court of Session: see Macphail (1988), supra at note 3, paras. 26-32 to 26-34.
24. This point was appreciated by Sheriff Macphail in Carvana v. Glasgow Corporation 1976 SLT (Sh.Ct) pp.5-8, and he sought to limit the sheriff's discretion: see also Macphail (1988), supra at note 3, para. 26-10.
25. This point is explored at pp.241-257 below.
26. This term "direct political involvement" was first used at pp.11-12 (and see also chapter one, footnote 8). I do not intend to provide a footnote reference for every citation.
27. See discussion below at chapter 14.
28. Arcari v. Dumbartonshire County Council 1948 SC, p.68; and Rodenhurst v. Chief Constable, Grampian Police, 1992 SLT, p.110.
29. See general discussion of protasis and apodosis in Twining and Miers, (1976), How To Do Things With Rules, pp.52-55.
30. The connection between this type of activity (i.e. "direct political involvement") and ostensive judicial impartiality is considered at pp.32-34 and chapter two above.
31. The connection between strong polycentric effect and ostensive judicial competence was developed at pp.34-35 and chapter two above.
32. T.F. v. Management Committee and Managers of Ravenscraig Hospital, (I.H.) 1988 SCLR 327 at 335.

33. Ibid.
34. Arcari v. Dunbartonshire County Council 1948 SC, per Lord President Cooper at 67.
35. Allen and Sons Billposting Ltd v. Corporation of Glasgow SC 1909 at p.76 per Lord Low.
36. Portobello Magistrates v. Edinburgh Magistrates (1882) 10 R 130.
37. See supra at pp.171-172.
38. E.G. see discussion of assumption of parental rights under the Social Work (S) Act 1968 (c.49) s.16 at chapter 13.
39. It was noted above (at p.161) that classifications of this nature may cause a degree of controversy, and may be incapable of resolution to the satisfaction of all.
40. For a recent example, see Rodenhurst v. Chief Constable, Grampian Police, supra at note 21.
41. The Grant Committee considered appeals of this nature at Cmnd. 3248, (1967), paras. 266-268. Himsworth commented on them in "Administrative Appeals to the Sheriff", (1985), (unpublished), under the heading "Restricted Powers of Review "B"", pp.28-36.
42. For a detailed discussion of this point, see chapter 14 below.
43. (c.66). The origin of the exclusion of the merits from shrieval review can be traced to the Second Report of the Guest Committee on Scottish Licensing Law, Cmnd. 2021 (1963) paras 102-105. These were commented on by the Grant Report (Cmnd 3248 (1967)) paras. 266, 267; and were approved by the Clayson Committee on Scottish Licensing Law, Cmnd. 5345 (1973), paras. 6.12 and 6.13.
44. See below at pp.301-307, pp.292-294.

**Footnotes: Chapter 10**

1. Cmnd. 3248 (1967), para. 263.
2. The Civil Judicial Statistics Scotland 1984-1988 (Scottish Courts Administration (HMSO) notes the statutory powers in local administration under "Miscellaneous and administrative business in sheriff courts" and "Registration of Clubs with the sheriff court."
3. See generally Himsworth, Adler and Scott, (1985), "Public Housing, Rent Arrears and the Sheriff Court".
4. I.E. The powers set out in chapter nine.
5. S.18, Mental Health (S) Act 1984 (c.36).
6. S.16, Social Work (S) Act 1968 (c.49).
7. E.G. Under s.39 Licensing (S) Act 1976 (c.66).
8. Supra at note 5.
9. Licensing (S) Act 1976 (c.66), ss.104, 105, 108, 109, 110.
10. Ibid, s.102.
11. Supra at note 6.
12. Supra at note 1.
13. Similarly, the final outcome of hearings may or may not be noted in the court book, according to the practice of the individual sheriff clerk.
14. I.E. Under the Public Health (S) Act 1897. (60 and 61 Vict.) (c.38).
15. I.E. Twenty full-time sheriffs. (part-time Temporary sheriffs may also sit).
16. Supra at note 5.
17. Supra at note 7.
18. See above at pp. 183-184.
19. Supra at note 6.

20. S.28F, Education (S) Act 1980 (c.44) (as inserted).

**Chapter Eleven - Footnotes**

1. See supra at pp.11-12 and chapter one footnote 8. I do not intend to provide a reference for every citation.
2. See supra at pp.32-34 and chapter two. I do not intend to provide a reference for every citation.
3. See supra at pp.34-35 and chapter two. I do not intend to provide a reference for every citation.
4. Supra at pp.162-163.
5. See supra at p.193 for note of the number of mental health appeals in the sample courts set out in chapter ten. Some idea of the number of club registrations can be gleaned from Civil Judicial Statistics, Scotland 1984-88 (Scottish Courts Administration) (HMSO) p.25.
6. See supra at p.164.
7. As in TF v. Management Committee of Ravenscraig Hospital 1988 SCLR 335 per Lord McDonald.
8. For these different sub-categories see pp.164-168 supra.
9. At pp.165-166 supra.
10. At p.192 supra.
11. See Liddall v. Ballingry Parish Council 1908 SC 1082.
12. See Dunblane and Lecropt Parish Council, Petitioner (1923) 40 Sh Ct Rep 3.
13. See Ayr Town Council, Petitioner (1891) Sh.Ct Rep. 196.
14. Cmnd 3248 (1967) paras. 287-289.
15. See Licensing (S) Act 1976 (c.66) ss.104, 105, 108, 109, 110 and p.121 supra.
16. But see note 5 supra.
17. (c.66), and see also discussion in chapter 14 below.
18. Presumably District Licensing Boards. See discussion below at pp.286-288 for constitution of District Licensing Boards.

19. For detailed discussion, see chapter 14 below.
20. See for example, Aitken v. Motherwell and Wishaw Licensing Court 1971 SLT (Sh.Ct), 25 and Patullo v. Dundee Corporation 1969 SLT (Sh.Ct) 31.
21. I.E. s.39, Licensing (S) Act 1976 (c.66).
22. As in ibid.
23. See supra at pp.164-165.
24. Western Isles Islands Council v. Caledonian MacBrayne, 1990 SLT (Sh Ct) 97. The Western Isles Council, as harbour authority, sought to prohibit the use of a pier on Sundays, in line with its policy of Sabbath observance. The Sheriff Principal, as confirming authority, held that the council had acted ultra vires and unreasonably.  
Although the issue of Sabbath observance is highly controversial in the Western Isles, the terms of the legislation are such that the Sheriff Principal was able to reach his decision without there being any likelihood of a challenge to ostensive judicial impartiality: the harbour authority's statutory discretion to make bye-laws is limited to matters concerning harbour administration, efficiency and safety.
25. See supra at p.164.
26. As noted at p.198 supra.
27. See for most weighty examples, chapter nine, section one (f) at pp.167-168 supra.
28. See National Assistance Act 1948 (11 and 12 Geo 6) (c.29) at pp.167-168 supra.
29. See Health Services and Public Health Act 1968 (c.46) at p.168 supra.
30. See Public Health (S) Act 1897 (60 and 61 Vict.) (c.38) at pp.166-167 supra.
31. (c.36).
32. Ibid.
33. Ibid ss.24 and 26; and Criminal Procedure (S) Act 1975, ss.174, 254, 376, 379.
34. Mental Health (S) Act 1984 (c.36), s.21.
35. Ibid, s.21(2)-(5) and s.113(1).



36. Mullan, (1975), "Fairness: The New Natural Justice", 25 University of Toronto L.J. 281 at 300. In general terms, Mullan was discussing when it might be appropriate to introduce procedural protections in decision taking.
  37. Mental Health (S) Act 1984 (c.36), s.21(5).
  38. TF v. Management Committee of Ravenscraig Hospital 1988 SCLR 334-335.
  39. Ibid. (NB The judgement was also reported as Ferns v. Ravenscraig Hospital Management in 1989 SLT 49.)
  40. As supra at note 38.
  41. Ibid.: for Arcari v. Dumbartonshire County Council see 1948 SC 62.
  42. Ibid.
  43. Ibid.
  44. Ibid.
  45. Parliamentary Debates, Scottish Grand Committee, Mental Health (Amendment) (S) Bill [Lords], First Sitting, 8th March 1983: the Secretary of State for Scotland, Mr George Younger, merely commented that the effect of the provisions "should be to ensure that no one is detained in hospital or continues to be so detained unless it is completely necessary that he or she should be."
- Clearly, the court would not have been able to consult Parliamentary debates (see also Second Sitting of the Scottish Grand Committee on 10th March 1983): see the comments of Sheriff Principal (now Lord) Caplan at 1988 SCLR 329 and 331.
46. See Sheriff Principal Caplan ibid and Article 5 of the European Convention on Human Rights; and also comments by the secretary of State for Scotland, Mr George Younger at First Sitting ibid. NB - discussion of the ECHR decision was in the context of the rights of those who had been detained as criminally insane.
  47. TF v. Management Committee of Ravenscraig Hospital 1988 SCLR 335.
  48. Mental Health (S) Act 1960 (c.61), ss.26-32.
  49. For the qualifications of MHOs, see Mental Health (S) Act 1984 (c.61), s.9.
  50. See supra at note 48.

51. See for example supra at pp.88-89.
52. Legal Aid (S) Act 1986 (c.47) s.14, [as amended 1990 (c.40), sch. 8], s.15 [as amended ibid, see also SI 1987/705, SI 89.720 and SI 90/939].
53. Ibid.
54. 1991 (c.47) ss.1, 2.
55. I.E. The Mental Health (S) Act 1984 (c.61).
56. See supra at note 54. N.B. s.2 provides that if a s.18 application is timeously lodged, approval or a first hearing must take place within 5 working days of the submission: detention continues for this period. Ss. 2 and 3 of the 1991 Act arose out of the difficulties created in B v. Forsey 1988 SLT 572 (N.B. see also R. Petitioner 1990 SCLR 738).
57. See ibid.
58. (c.47) This provision concerns applications for Legal Aid made under Part III of the Social Work (S) Act 1968 (c.49).
59. (c.49).
60. (c.47).
61. See supra at note 54.
62. This point is implicit in Fuller, "Forms and Limits of Adjudication", (1978) Harvard Law Review, pp.365-372.
63. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change", 9 Law and Society Review.
64. For a general commentary on the Childrens' Hearing system, see Kearney, (1987), Children's Hearings and the Sheriff Court.
65. For an excellent discussion on the difficulties and tensions created for "generalist" judges by expert evidence, see Jones, (1984) "Science in Harness: A Study of the Expert Witness in the Legal Construction of Reality" (Ph.D Thesis) (Cambridge University), esp. pp.189-201.
66. See Little, "The Sheriff and Compulsory Admissions to Hospital Under the Mental Health (S) Act 1984", Socio-Legal Research in the Scottish Courts, Volume 2 (1991) (Eds. Adler and Millar) p.69 at p.77.

67. See general comment at note 65 supra.
68. See supra at note 66.

**Chapter 12: Footnotes**

1. At pp.169-173 supra.
2. Ibid.
3. See discussion supra at pp.32-34 and chapter two. I do not intend to provide a reference for every citation.
4. See discussion supra at pp.34-35 and chapter two. I do not intend to provide a reference for every citation.
5. This point was noted by Himsworth, (1985) "Administrative Appeals to the Sheriff" (unpublished). The first sub-category is analogous to "general powers of review" (ibid, p.10); and the main example of the second sub-category is s.28 of the Education (S) Act 1980 (ibid pp. 21-22).
6. See generally pp.163-173 supra.
7. Himsworth (1984), "Scottish Local Authorities and the Sheriff) Juridical Review 63 at 67.
8. See p.173 supra for Housing (S) 1987.
9. Thom v. Glasgow Corporation (1942) 58 Sh.Ct Rep 94. N.B. The sheriff's powers in this case were held under the Housing Act 1966, s.109(4): see also discussion in Himsworth, (1984), "Scottish Local Authorities and the Sheriff", Juridical Review 63 at 75.
10. (1983) 28 Journal of the Law Society of Scotland 469.
11. Ibid.
12. See supra at pp.42-49.
13. Cd. 8713 (1917), p.84. See also discussion at pp.99-100 supra and Himsworth, (1979), 2 Urban Law and Policy, 77 at 90.
14. See supra at pp.32-35, 38-40 and 42-49.
15. (c.44).
16. See pp.241-257 below.
17. 1984 Juridical Review noted supra at note 7, pp. 85-86.

18. Himsworth, (1980), "School Attendance Orders and the Sheriff", Journal of the Law Society of Scotland, 450.
19. Ibid, p.453.
20. See eg pp.174-177 and 183-185 supra.
21. I.E. District, Regional or Islands authorities.
22. (11 and 12 Geo.6) (c.53).
23. Roddie v. Strathclyde Regional Council 23 June 1989 (Glasgow Sheriff Court) (unreported) (Sheriff Dean).
24. Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223.
25. Roddie, supra at note 23, pp. 1, 2.
26. Ibid, p.2.
27. Ibid, p.3: "... It is an English decision and refers only to the appellate court's judicial capacity ... it could not have had in contemplation the functions and roles of the sheriff.
28. Carvana v. Glasgow Corporation, 1976 SLT (Sh.Ct) 3; and see discussion supra at pp.154-156.
29. Roddie, supra at note 23, p.4.
30. Ibid.
31. Ibid, pp. 4-5.
32. Ibid.
33. See op.cit at note 28 supra.
34. See discussion supra at p.155.
35. See ibid and Himsworth (1984) op cit at note 7 supra p.80.
36. See discussion supra at p.31 and chapter two.
37. Himsworth (1985), op cit at note (5) supra, p.18.

38. Ibid, p.20.
39. Ibid, p.19; see also discussion of Fuller's arguments on polycentric decisions at pp.15-16 supra.
40. See discussion at pp.234-235 supra and citation at note 10 supra.
41. This point is implicit in Fuller, (1978), "The Forms and Limits of Adjudication", 92 Harvard Law Review, pp.397-398.
42. See generally discussion in chapters one and two.
43. Supra at note 23.
44. Council on Tribunals, Annual Report 1990-91 (HMSO) para. 3.37.
45. (c.44); as inserted by s.1 of the Education (S) Act 1981 (c.58) s.1.
46. (c.44).
47. Adler, Petch and Tweedie, (1989), Parental Choice and Educational Policy.
48. Many of them had participated recently in the Adler, Petch and Tweedie project ibid.
49. Adler, Petch and Tweedie did not interview sheriffs.
50. See for example pp.120-121 supra.
51. See discussion at p.235-236 supra.
52. Himsworth supra at note 18; Doran, "School Attendances and Exclusions" (1980) SCOLAG 66.
53. Adler, Petch and Tweedie, at note 47 supra, chapter two.
54. Ibid p.39.
55. Ibid, pp.38-39.
56. Ibid, pp. 49-51.
57. Ibid, pp. 39-43.
58. Ibid, p.52-53. The strongly political nature of parental choice of school and education appeals is illustrated by the recent full page newspaper coverage of

the 1980 Education Act after 10 years in operation: "So Who Really Won the Revolution?" , The Scotsman, Wednesday 2nd September 1992, p.10.

59. This would be consistent with the recommendations of the Grant Report: see Cmnd 3248 (1967) para. 264.
60. See pp.43-46 supra.
61. (c.44), as amended by Education (S) Act 1981 (c.53) s.1: see also Black v. Strathclyde Regional Council, (Kilmarnock Sheriff Court) (August 27 1982) (unreported).
62. (c.44), s.28A(1).
63. Ibid, s.28A (3).
64. Ibid.
65. Ibid.
66. Ibid, ss. 28A(4), 28C, 28D, 28E; and see Education (Appeal Committee Procedures) (S) Regs 1982 (S.I. 1982 No. 1736).
67. Ibid, s.28F.
68. Ibid, s.28F(5).
69. Ibid.
70. Ibid s.28F(6), (7).
71. This point was implied by Himsworth (1985), supra at note 5, pp. 19-20 (esp. para. 3.21) and is discussed in detail below.
72. G v. Shetland Islands Council (Lerwick Sheriff Court) (19 October 1983). (Sheriff MacDonald) (unreported).
73. Ibid, p.6.
74. D v. Grampian Regional Council (Aberdeen Sheriff Court) (29 August 1984) (Sheriff Risk) (unreported).
75. Ibid, p.4.
76. A.B. v. Strathclyde Regional Council (Glasgow Sheriff Court) (6 September 1982) (Sheriff Principal Dick) (unreported). NB - The case before the sheriff

was an appeal from Sheriff Mc Neill (see A.B. v. Strathclyde Regional Council, (Glasgow Sheriff Court), (16th August 1982), (unreported).

77. Ibid, (6th Sept 1982), p.10.
78. Ibid.
79. Ibid. The Sheriff Principal also made it clear that he considered the sheriff's powers to be "administrative" (i.e. governmental), rather than "judicial": "Considering The Education Act, it humbly does not appear to me that there is any lis between the parent and the education authority, and on this test the appeal to the sheriff appears to be to the sheriff in an administrative capacity". (Ibid, p.8-9).
80. Duggan v. Strathclyde Regional Council (Glasgow Sheriff Court) (17 Aug 1983) (Sheriff Maguire) (unreported).
81. E.G. Murray v. Strathclyde Regional Council; Paul v. Strathclyde Regional Council: These appeals were conjoined with Duggan ibid, but they were not a single appeal and the case of each child was considered separately.
82. Carvana v. Glasgow Corporation 1976 SLT (Sh. Ct 3); and see discussion at pp.154-156 supra.
83. Adler, Petch and Tweedie, op. cit at note 47, pp. 159-164.
84. Ibid, pp. 160-161.
85. Ibid, pp. 159.160.
86. Adler, Petch and Tweedie, "When Sheriffs Differ", Times Educational Supplement, Scotland, (27.2.87), p.8 (column 4).
87. See discussion at pp.31-36 supra.
88. See discussion at pp.51-52 supra.
89. Himsworth, (1984), op cit. at note 7 supra, p.80.
90. Ibid.
91. Himsworth, (1985), op cit at note 5 supra, p.26.
92. The requirement to review all the decisions under s.28 F(6), (7) re-enforces this fact.



93. See ibid.
94. G v. Shetland Islands Council (Lerwick Sheriff Court) (19 October 1983) (Sheriff MacDonald) (unreported).
95. Ibid., p.6.
96. D v. Grampian Regional Council (Aberdeen Sheriff Court) (29 August 1982) (Sheriff McNeill) (unreported).
97. Ibid., p.4.
98. Y. v. Strathclyde Regional Council, (Glasgow Sheriff Court), (16th August 1982), (Sheriff McNeill), (unreported).
99. Ibid., p.4.
100. MacCormick, (1976), Legal Reasoning and Legal Theory) rightly stresses the importance of skilled representatives and expert legal knowledge in choosing the grounds which are most likely to be successful in adjudication (see ibid p.46 and pp. 119-128).
101. I.E. Queen's Counsel.
102. Macphail, (1988), Sheriff Court Practice, para. 26-16.
103. Education (S) Act 1980 (c.44), s.28A(3)(iv) (and see Forbes v. Lothian Regional Council (Edinburgh Sheriff Court) (29 October 1982) (unreported) where the sheriff was persuaded by this argument).
104. Ibid s.28(A)(3) (i)-(iii).
105. See MacCormick (1976), op cit at note 100 supra.
106. See Goodwin Jones (1984), "Science in Harness: A Study of the Expert Witness in the Legal Construction of Reality" (Ph.D. Thesis) (Cambridge University), pp. 134-163 for an excellent discussion of the relationship between lawyers and expert witnesses.

**Footnotes - Chapter 13**

1. See discussion at pp.170-172 and 178-182 supra.
2. See discussion in chapter two supra.
3. I.E. at p.197 and pp.231-232 supra.
4. See pp.11-12 and chapter one, footnote 8 supra. I do not intend to provide a reference for every citation.
5. See pp.32-34 and chapter two supra. I do not intend to provide a reference for every citation.
6. See discussion of Fuller's arguments in "Forms and Limits of Adjudication" 92 Harvard Law Review 353-409 on polycentric effect at pp.15-16 supra. I do not intend to provide a reference for every citation.
7. See pp.34-35 and chapter two supra. I do not intend to provide a reference for every citation.
8. See pp.178-182 supra.
9. See pp.169-172 supra.
10. See p.178 supra.
11. Fuller (1978) "The Forms and Limits of Adjudication" 92 Harvard Law Review, pp. 397-398 recognised that identifying what an acceptable degree of polycentric effect is an inherently difficult and subjective task.
12. (c.2); and see also pp.179 supra.
13. See generally Stewart, "A Survey of Electoral Registration Cases", 1980 SLT (News) 250.
14. Representation of the People Act 1983 (c.2), s.57(1)(b), (2): the Act is a consolidating statute.
15. 1980 SLT (Sh. Ct) 60; and see also Stewart at note 13 supra for wider discussion. N.B. The appeal was made under earlier legislation, which was consolidated in the 1983 Act.
16. The Liberal party agent sought to have the conservative parliamentary candidate's name struck from the roll of voters on the ground that what had been recorded as his residence in the constituency for electoral purposes was

not his main residence.

17. I.E. The right to a proof; the right to present full arguments; the right to natural justice; and the right to a reasoned decision.
18. I.E. the Electoral Registration Officer: his functions are set out at Representation of the People Act 1983 (c.2), ss. 8-17, 49-55.
19. Moore v. Electoral Registration Officer for Borders 1980 SLT (Sh Ct) 39; and see Stewart, supra at note 13, p.254.
20. (Ayr Sheriff Court) (15 May 1978) (Sheriff Grant) (unreported).
21. Moore, supra at note 19, p.40 (per Sheriff Principal Sir Frederick O'Brien).
22. (c.74).
23. (c.65).
24. See provisions noted at p.181 supra.
25. Mandla v. Dowell Lee [1983] QB1: see judgements of Lord Denning, Oliver L.J. and Kerr L.J.; and then serious criticisms made in House of Lords [1983] 2 AC 560-568 per Lord Fraser: see also chapter two, footnote 46 supra.
26. 1976 (c.74), Part VII; and 1975 (c.65), Part VI.
27. See provisions noted at p.181 supra.
28. N.B. What little precedent exists is English: e.g. CRE v. Amari Plastics Ltd [1982] Q.B. 1194.
29. N.B. point made supra at note 11.
30. Abolition of Domestic Rates (S) Act 1987 (c.47), ss.16, 29.
31. E.G. Stevenson v. Rogers (Edinburgh Sheriff Court) (3 Nov. 1989); 1989 GWD 40-1876; 1990 (Sh.Ct) SCLR; 1990 SLT (Sh Ct) 30; 1991 SCLR 673 and 1992 SLT 558..
32. 1987 (c.47), s.16.
33. Ibid, s.29.
34. See e.g. Reid, Scobbie and Barker, "Residence, The Community Charge and the Sheriff" 1990 SCOLAG, p.55 for comment of Lord MacLehose on Beoch

- v. Wood (Ayr Sheriff Court) (18 December 1989) 1990 GWD 4-219 and Stevenson v. Rodgers, supra at note 31.
35. Reid, Scobbie and Barker, SCOLAG 1990, pp.38-40; 55-56; 87-89; 100-102; SCOLAG 1991, pp. 74-76.
  36. Ibid p.56.
  37. Ibid.
  38. 1987 (c.47), ss.12-20C; and see Reid, Scobbie Barker, ibid, at pp. 87-89 for detailed comment on the role of the registration officer.
  39. I.E. 1987 (c.47) ss. 16, 29.
  40. See for a comprehensive discussion of the Court of Session's recent rulings Reid and Scobbie SCOLAG 1991, pp. 74-76, and Stevenson v. Rogers, 1992 SLT 558.
  41. (c.49). For general discussion see Macphail, (1988), Sheriff Court Practice, paras. 28-218 to 28-226.
  42. The s.16 procedure (as amended) is used by authorities as a means of planning for permanent substitute care: however, an increased use of freeing for adoption and custody procedures has led to a reduction in the number of s.16 applications: see for comment Child Care Law Review, Consultation Document One, (January 1989), (SWSG), paras 3.3 - 3.5, and for comment on freeing for adoption, see O'Hara, "Freeing for Adoption - The Children Who Wait", SCOLAG No. 119, pp. 123-125.
  43. Ibid, para 3.1: "There is a widespread view that the present system for assumption of parental rights is outdated and inherently unjust." See also final report, "Review of Child Care Law in Scotland", (HMSO), pp.21-24.
  44. See chapter two supra for general comment.
  45. Children could not be interviewed for practical reasons: it is accepted that the research findings should be viewed in this context.
  46. As amended: see full citation of amendments etc at p.179 supra.
  47. Social Work (S) Act 1968 (c.49), (as amended), s.16(1)(a)(iv); and for definition of timing arrangements, see Strathclyde Regional Council v. M, 1982 SLT (Sh.Ct) 106.

48. 1968 (c.49) ibid, s.16(5), (6), (10): repealed in part - see supra at p.179
49. Ibid, at s.16(7).
50. Ibid, and s.16(8).
51. Ibid, s.16(8)(a).
52. Ibid, s.16(8)(b).
53. Ibid, s.16(8)(c).
54. See supra at notes 4 and 5 respectively.
55. See supra at notes 7 and 6 respectively.
56. Central Regional Council v. B. 1985 SLT 413.
57. Ibid, p.420, per Lord Brand.
58. I.E. Arcari v. Dumbartonshire County Council, 1948 SC 62; and see comment at pp.135-137 supra.
59. Central Regional Council v. B. supra at note 56, p.420.
60. Ibid.
61. For composition of social work department committees, see The Laws of Scotland: Stair Memorial Encyclopaedia, Volume 22, "Social Work", para.8.
62. Lothian Regional Council v. T 1984 SLT 74, per Sheriff Caplan at p.80.
63. Lothian Regional Council v. M. 1982 SLT (Sh.Ct) 65.
64. IE - sphere of interest.
65. See also Review of Child Care Law in Scotland (HMSO) para 11.4.
66. See also Child Care Law Review Consultation Document One, supra, at note 42, para. 3.1.
67. Review of Child Care Law in Scotland (HMSO), paras 11.6 - 11.18.
68. Ibid, para. 11.9.

69. Ibid, para 11.10.
70. This is in accordance with ibid, para 11.6.
71. Murray (1988) Research Paper on Evidence from Children, (Scottish Law Commission) provides a concise discussion of the problems caused for children by the court process (see especially chapter III to VII). N.B. the report is concerned with criminal proceedings, but it is submitted that much of the discussion and many of the recommendations are highly relevant to assumption of parental rights hearings.
72. Reporters in this context should not be confused with Reporters to the Children's Panels.
73. Kennedy v. M. 1989 SLT 687; see also 1989 SCLR 769 (Notes).
74. Review of Child Care Law in Scotland (HMSO), para 11.10.
75. Ibid.
76. A subtle variation of the relationship between legal representative and expert witness which is discussed fully in Goodwin Jones, "Science in Harness: A Study of the Expert Witness in the Legal Construction of Reality" (Ph.D Thesis) (1984) (Cambridge University), pp. 134-163.
77. Central Regional Council v. B 1985 SLT 413, pp.415-416 per Lord Robertson.
78. Mental Health (S) Act 1984(c.36), ss 18-21 (as amended).
79. Social Work (S) Act 1968 (c.49), s.42; see also Kearney (1987) Children's Hearings and the Sheriff Court (1987) Pt. II.
80. Response of the Scottish Child Law Centre Working Party to the Child Care Law Review: Consultation Document 1 (unpublished) (SCLC) para. 3.9 (3).
81. The civil legal aid means test is set out under Legal Aid (S) Act 1986 (c.47), s.14 [as amended 1990 (c.40), sch.8], s.15 [as amended ibid, see also SI 1987/705, SI 89/720 and SI 90/839].
82. Legal Aid (S) Act 1986 (c.47), s.29(2)(b), (4).

**Footnotes - Chapter 14**

1. As set out in chapters one and two supra.
2. See pp.182-185 supra.
3. (c.66).
4. See p.192 supra for number of appeals made in the sample courts set out in chapter ten.
5. I.E. the other appeals taken from the decisions of District Councils noted at pp.183-185 supra.
6. (c.66) s.7.
7. I.E. in appeals under s.39 of the Licensing (S) Act 1976 and the other "administrative judge" appeals noted op.cit at note 5 supra.
8. Mr G R Maclean, Blair and Bryden, Solicitors, Clydebank. I am grateful for Mr Maclean's assistance.
9. For general comment, see Himsworth, (1985), "Administrative Appeals to the Sheriff" (unpublished). paras. 3.35 to 3.43.
10. 1976 (c.66) s.39(8).
11. Ibid, s.39(4)(a).
12. Ibid, s.39(4)(b).
13. Ibid, s.39(4)(c).
14. Ibid, s.39(4)(d).
15. See pp.32-34 and chapter two supra. I do not intend to provide a reference for every citation of "ostensive judicial impartiality".
16. See Fuller, (1978), "The Forms and Limits of Adjudication", 92 Harvard Law Review, pp. 393-404; and discussion at pp.15-16 supra.
17. See pp.34-35 and chapter two supra. I do not intend to provide a reference for every citation of "ostensive judicial competence".
18. See pp.11-12 supra and footnote 8, chapter one. I do not intend to provide a reference for every citation of "direct political involvement".

19. See op cit at note 16 supra.
20. See general principles set out at in chapters one and two supra.
21. See discussion at pp.31-32 supra.
22. See discussion at ibid.
23. Op cit at note 20 supra.
24. I.E. set up under 1976 (c.66), ss.1-8.
25. Local Government (S) Act 1973 (c.35), s.4.
26. "We are satisfied that the licensing process is the application of an administrative discretion in the interests of the community and that it is therefore not an appropriate function for a court of law... Once it has been established that licensing is an administrative process, logic suggests that responsibility for it should be placed on an established administrative body answerable to the electorate for the exercise of its functions - namely, in view of the local nature of licensing decisions, the district council." Report of the Departmental Committee on Scottish Licensing Law (Clayson Report) Cmnd. 5354 (1973) paras. 5.22 to 5.23.

The political nature of licensing has been illustrated clearly by the recent controversy concerning violent disturbances in an around licensed premises in Scottish cities: see full page feature in The Scotsman, 22nd September 1992, p.4.

27. Op cit at note 16 supra.
28. I.E. The focus on the individual case and the difficulties of weighing evidence "on its merits" in this type of case: see also ibid.
29. For an example of this type of approach, see discussion of higher governmental powers in education at pp.246-257 supra.
30. See p.302 below.
31. Op cit at note 16 supra.
32. Which requires certainty in judicial decision-taking. See discussion at pp.34-35 and chapter two supra.
33. Cmnd. 5354 (1973) para 5.22; and see op cit at note 26 for a more detailed citation.



34. Scottish Licensing Law (First Report of Guest Committee) Cmnd. 1217 (1960); Scottish Licensing Law (Second Report of Guest Committee) Cmnd. 2021 (1963).
35. Cmnd. 5354 (1973) para. 6.13.
36. I.E. - Natural justice is included: see 1976 (c.21), s.39(4)(c), and Himsworth, (1985), at note 9 supra, para. 3.48.
37. I.E. - The sheriff is not required to exercise a power which requires "direct political involvement"; see pp.11-12 and footnote 8, chapter one for general discussion.
38. I.E. 1976 (c.66) s.39(4)(a) to (d).
39. I.E. under ibid s.39(8).
40. See discussion at pp.244-245 supra.
41. See p.35 supra.
42. C.S.S.U. v. Minister for the Civil Service [1985] AC 374 at 410. The case was adopted in Scots Law in City of Edinburgh District Council v. Secretary of State for Scotland 1985 SLT 551.
43. 1978 SLT 38.
44. See discussion at pp.169 and 182-183 supra.
45. 1985 SLT 302 per Lord Mayfield.
46. 1983 SLT (Sh.Ct) 5.
47. 1987 SLT (Sh.Ct) 54.
48. I.E. the focus of the court is on questions of law.
49. At pp.31-36 supra.
50. Fuller, op cit at note 16 supra.
51. Ibid, esp at pp. 397.
52. This general point is supported by Mullan's arguments on the applicability of procedural fairness (which is inherent in adjudication). See Mullan (1975), "Fairness; The New Natural Justice", 25 University of Toronto Law Journal

281 at 300.

53. "Alcoholic Liquor", The Laws of Scotland: Stair Memorial Encyclopaedia Volume Two, para. 89.
54. Ibid.
55. Fitzpatrick v. Glasgow District Licensing Board 1978 SLT (Sh.Ct) 63.
56. Op cit at note 53 supra.
57. It is incompetent to lead evidence concerning the other grounds of appeal: see Troc Sales Ltd v. Kirkcaldy District Licensing Board 1982 SLT (Sh.Ct) 77; Cigaro (Glasgow) Ltd v. City of Glasgow District Licensing Board 1983 SLT 549; Tennent Caledonian Breweries Ltd v. City of Aberdeen District Council 1987 SLT (Sh.Ct) 2.
58. Lord President Emslie made this point implicitly in Cigaro (Glasgow) Ltd v. City of Glasgow DLB, ibid, at 552: "The necessary inference of Parliament's intention which falls to be drawn from a consideration of these matters is that ... license appeals [i.e. excluding appeals on error of fact] should be disposed of without evidence and upon the record of the proceedings before the board."
59. E.G. under school placing appeals: see for general discussion pp.241-257 supra.
60. Civil Government (S) Act 1982 (c.45) para. 18.
61. Jones, "Mistake of Fact in Administrative Law", 1990 Public Law, 507.
62. Ibid, p.526.
63. See Jones' comparison of "Expansive" and "Limited" review of pp.512 - 520 ibid.
64. All three sheriffs made this clear during interview: it was felt to be "self-evident" that the court should be wary of intervention under this ground. *Arthur, Loosefoot and Ant Wells.*
65. Jones (1990), op cit at note 61 supra, p.525.
66. As discussed by Jones ibid.
67. Fuller (1978) op cit at note 16 supra, and pp.397-398, in particular: distinguishing what is justifiable or otherwise is a matter of degree.
68. Martin v. Ellis 1978 SLT (Sh.Ct) 38 at 40 per Sheriff Principal Sir Frederick

O'Brien.

69. Civic Government (S) Act 1982 (c.45), s.64(4)(c).
70. Cigaro (Glasgow) Ltd v. City of Glasgow District Licensing Board 1983 SLT 549 t 553 per Lord President Emslie.
71. Himsworth, (1985), op cit at note 9 supra, p.36.
72. I.E. at pp.284-285 supra.
73. I.E. when members of the licensing board use their local knowledge in an application and insufficient opportunity is given to the applicant to comment. See The Laws of Scotland: Stair Memorial Encyclopaedia, op cit at note 53, para 90.
74. Tennent Caledonian Breweries Ltd v. City of Aberdeen District Council 1987 SLT (Sh.Ct) 2.
75. See Allan and Chapman, (1989), The Licensing (S) Act 1976 (2nd ed) p.75 for a useful synopsis of the main decisions relating to natural justice.
76. Ibid.
77. Ibid.
78. 1983 SLT (Sh.Ct) 84.
79. Low v. Kincardine Licensing Court 1974 SLT (Sh.Ct) 54.
80. The leading case on this point is Tennent Caledonian Breweries Ltd v. City of Aberdeen District Council, 1987 SLT (Sh Ct) 2.
81. 1982 (c.47), schedule 1, para 18(8).
82. This point is implicit in Mullan's "spectrum theory", noted op cit at note 52 supra.
83. The "local" qualities of the sheriff court were commended by the Grant Report Cmnd.3248 (1967) para. 264.
84. See generally Fuller (1978) at note 67 supra.
85. See generally Mullar's "Spectrum Theory", noted op cit at note 52 supra.

86. 1976 (c.66).
87. Allan and Chapman (1989), noted op cit at note 75 supra, p.75.
88. A point which was recently stressed in Rodenhurst v. Chief Constable, Grampian Police, 1992 SLT 104.
89. See generally discussion at pp.154-159 supra.
90. I.E. Allen and Sons Billposting Ltd v. Edinburgh Corporation 1909 SC 70; and see generally discussion supra at pp.109-111.
91. See op cit at note 88 supra.
92. 1963 (c.2), Sched 6, para 7.
93. 1968 (c.65), Sched 9, para (8)(2).
94. Himsworth, "Scottish Local Authorities and the Sheriff" 1984 JR, 63 at 80.
95. Carvana v. Glasgow Corporation 1976 SLT (Sh.Ct) 3; and see discussion at pp.154-56 supra.
96. 1971 SLT (Sh.Ct) 25.
97. Ibid, at p.26.
98. 1969 SLT 31.
99. Ibid at p.32.
100. Ibid at pp. 32-33.
101. E.G. MacGregor v. Berwickshire County Council 1967 SLT (Sh.Ct) 13.
102. MacIntyre v. Elie and Earlsferry Town Council 1967 SLT (Sh.Ct) 78 at 79 per Sheriff Kydd (not the same Sheriff Kidd as in Patullo supra at note 98).
103. They are cited accordingly in Allan and Chapman, op cit supra at note 75, p.75.
104. 1983 SLT (Sh.Ct) 11; see also Mecca Ltd v. Edinburgh Corporation 1967 SLT (Sh.Ct) 43 for a general example of unreasonableness.
105. Where there is no right of appeal under statute, review can take place via an application for judicial review in the Court of Session. (e.g. a board was held

to have acted ultra vires in Allied Breweries (UK) Ltd v. City of Glasgow Licensing Board 1985 SLT 302.)

106. I.E. from Lord Low's decision in Allen and Sons Billposting Ltd v. Edinburgh Corporation 1909 SC 70 (and see discussion supra at pp.109-111).
107. In Patullo v. Dundee Corporation: see comment at pp.302-303 supra.
108. Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223 per Lord Greene. The case has been adopted by the Scottish courts, and the Court of Session has made it clear that it considers "Wednesbury unreasonableness" to be an "exacting" test (K v. Scottish Legal Aid Board 1989 SCLR 144 at 145 per Lord Cullen).
109. CSSU v. Minister for the Civil Service [1985] AC 374 at 410 et seq. per Lord Diplock. The case was adopted into Scots Law in City of Edinburgh DC v. Secretary of State for Scotland 1985 SLT 551. "Irrationality" was discussed in K v. Scottish Legal Aid Board (see ibid); McAlinden v. Bearden and Milngavie D.C. 1986 SLT; and Purdon v. Glasgow District Licensing Board 1988 SCLR 466. In Purdon (ibid) Lord Davidson (at p.469) made it clear that the "irrationality" test is a stringent one when he stated, in the context of a discussion of inferences which could be drawn from a lack of reasons, that: "In an application for judicial review the onus rests upon [the petitioner] to demonstrate that the decision challenged is irrational only if on a consideration of the whole averments the court inclines to the conclusion that there is no material upon which a rational refund could be based."
110. Allan and Chapman, op cit at note 75 supra, p.75.
111. 1989 SLT 110.
112. 1990 SCLR 73.
113. 1990 SLT 307; 1990 SCLR 1.
114. See discussion at p.34 supra.
115. Op cit at note 108 supra.
116. Op cit at note 109 supra.
117. See generally Jowell and Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law", 1987 Public Law, pp.368-382 for an excellent discussion of unreasonableness and irrationality.

The authors note that under the guise of reasonableness, "for many years ...

judges have been stating principles of substantive review of administration without knowing or, more likely, admitting it." They then go on to formulate brief "general principles" of substantive review. Interestingly, Lord Clyde, in Stewart v. Monklands District Council 1987 SLT 630 at 633 showed a sophisticated appreciation of the difficulty inherent in determining unreasonableness. He commented that: "It may be preferable to formulate the test in terms of whether the authority was entitled to reach its decision rather than concentrate on the case which lies at the extreme end of all possible cases...."

His decision shows appreciation of the fact that, as Jowell and Lester have noted, irrationality/unreasonableness "while appropriate to cover arbitrary or capricious conduct, is not a satisfactory way of describing the more normal types of abuse of public power that give rise to judicial review while being within the scope of a statute and procedurally satisfactory." (*ibid* p.371).

118. See generally Fuller (1978), op cit at note 16 supra.
119. See quotation at p.303 supra.
120. Although it should be noted that it is recognised that the reasonableness/irrationality test is not without its problems see note 117 supra.

**Footnotes - Chapter Fifteen**

1. Bradley, Scottish Law Commission Memorandum No. 14, "Remedies in Administrative Law", para 10.2.
2. Ibid.
3. Raz, "The Rule of Law and its Virtue", 1977 93 Law Quarterly Review 195.
4. Ibid at p.198.
5. Ibid at pp.198-202.
6. Ibid at pp.208-211.
7. See above at p.30.
8. See above at p.31.
9. Fuller, "The Forms and Limits of Adjudication", 1978, 92 Harvard Law Review 353.
10. Ibid, at pp.394-404.
11. At note 1 supra.
12. I.E. under the Heritable Jurisdictions (S) Act 1747.
13. Cmnd. 3248 (1967), para. 264.
14. E.G. Rodenhurst v. Chief Constable, Grampian Police 1992 SLT 104.
15. 1909 SC 70.
16. 1944 SC 97.
17. In Allen, supra.
18. In Glasgow Churches' Council, supra.
19. As noted supra at note 12, chapter VIII and Appendix VIII.
20. In "Scottish Local Authorities and the Sheriff", 1984 Judicial Review, p.63; "Administrative Appeals to the Sheriff" (1985) (unpublished); and "Administrative Appeals to the Sheriff: Statutory Title-Conferring Formulae" (1987) (unpublished).

21. 1976 SLT (Sh Ct) 3, per Sheriff Macphail.
22. As noted supra, at note 14.
23. In "Administrative Appeals to the Sheriff" (1985) (unpublished).
24. Ibid.
25. Licensing (S) Act 1976 (c.66), ss. 102-108.
26. Mental Health (S) Act 1984 (c.36), s.18.
27. Education (S) Act 1980 (c.44) s.28 (as amended).
28. Social Work (S) Act 1968 (c.49), s.16.
29. Review of Child Care Law in Scotland HMSO (Scottish Office).
30. (c.66).



## **APPENDIX "A": BIBLIOGRAPHY**

The bibliography is divided into three parts:

- (i) primary sources;
- (ii) secondary sources; and
- (iii) official and semi-official reports and papers.

### **(i) Primary Sources**

#### **(a) Scottish Record Office**

1. Sheriff court records, stored under indexes SRO SC/1 to SRO SC/70. The following files were cited in the text;

SRO SC 20/5-440 to 453; SRO SC 20/8-7; SRO SC 39/91-9; SRO SC 49/58-2; SRO SC 49/58-3; SRO SC 49/22-3; SRO SC 49/22-7 to 8; SRO SC 39/90-90 to 103; SRO SC 29/10-554 (B77/1951; B130/1951; B167/1951); SRO SC 39/92-1 to 10; SRO SC 39/106-9; SRO SC 6/84-5; SRO SC 1/70-1; SRO SC 1/70-6; SRO SC 6/82-2; and SRO 39/47-2 to 12.

2. The Ivory Papers on the Skye Expedition of 1886: SRO GD.1/36.

3. Scottish Home and Health Department Records on the Skye Expedition of 1886. See the following files;

SRO HH 1/1-306; SRO HH 1/458-61; SRO HH 1/710-3; SRO HH 1/1-58; SRO HH 1/1-203; SRO HH 1/1 -246; and SRO HH 1/1-712.

#### **(b) Scottish Courts Administration**

1. Copies of the written and oral evidence presented to the Grant Committee on the Sheriff Court (for final report, see Cmnd. 3248 (1967)). The files were not indexed or stored in any particular order. Reference is made in the footnotes to individual files by date or as otherwise appropriate. The files may still be closed on the instructions of the Secretary of State: I am grateful to the Scottish Courts Administration for permitting access to the papers.

The following files were particularly useful. Minutes of the 2nd, 24th, 25th, 33rd, and 37th meetings of the Grant committee. Minutes of oral evidence presented to the committee on 21st December 1964; 11th January 1965; 18th January 1965; 5th February 1965; 15th February 1965; 17th May 1965, 4th June 1965, and 18th June 1965. Files cited as SCA B/Law/29/1A; SCA B/Law/29/8; SCA B/Law/29/8A; SCA B/Law/29/9; and SCA B/Law/29/15A.

2. Draft copies of the Civil Judicial Statistics Scotland 1984-1988, which were made available to me prior to publication. Once again, I am grateful to the Scottish Courts Administration for their assistance.

(c) Sheriff Court Records

The Summary Applications ("B" Registers) for the following sheriff courts:  
Aberdeen; Dundee; Edinburgh; Glasgow; Dunfermline; Inverness; Paisley;  
Stirling; Dunoon; Duns; Jedburgh; and Peterhead.

I am grateful to the Scottish Law Commission and Sheriff Principal Nicolson for their assistance in securing access to the court registers.

(d) Scottish Law Commission

The written Memorandum of Evidence Presented by Sheriffs Depute to the Grant Committee on the Sheriff Court. I am grateful to the Commission for permitting access to the file, and to Sheriff Principal Nicolson for ensuring access to sheriffs.

(e) Interviewees

I am grateful to all interviewees for taking part in the research project.

**(ii) Secondary Sources**

NB - Not all of these references have been cited in the text. Page numbers have been given only when the relevant volume lacks a list of contents.

Adler, Petch and Tweedie, "When Sheriffs Differ", Times Educational Supplement Scotland, (27.2.87).

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**Appendix "B": Statistical Data**

This appendix provides raw data collected from twelve representative sheriff courts. The purpose of the exercise was to ascertain the frequency of appeals in the period 1984-1986 inclusive. A table giving an annual breakdown of the total number of applications for all twelve courts is set out in chapter ten.

The sheriff courts are "city" courts (Aberdeen, Dundee, Edinburgh, and Glasgow), "town" courts (Dunfermline, Inverness, Paisley, and Stirling), and "rural" courts (Dunoon, Duns, Jedburgh and Peterhead).

The number of individual applications made in each court in each year is noted, together with a total for each provision. A percentage is given with the total: this gives an indication of its proportion in terms of the total number of applications made under the provision in question in the twelve courts. The percentage figures are rounded up to the nearest percentage point.

A grand total is given for each court, together with a percentage figure, which represents the proportion of the grand total of all twelve courts.

**Aberdeen Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified		1		1:7%
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	3		1	4:4%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified		1		1:3%
<b>Firearms Act 1968</b> s 26 s 44 unspecified		6	1	7:35%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified	2	1 1		3:100% 1:100%
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified	3			3:100%
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	3 1	4	3	10:8% 1:100%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	53	45	98:18%
<b>Mental Health (S) Act 1960</b> Part IV	69	N/A	N/A	69:19%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	2	4	2	8:1%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	4	9	8	21:5%
<b>Road Traffic Act 1972</b> s 90		1		1:7%
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified	27	1	2	3:9% 27:69%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	181	227	237	645:14%
<b>Rates</b>	13	11	10	34:9%
<b>Value Added Tax</b>	937	1453	370	2760:11%

**GRAND TOTAL: 3697:12%**

**Dundee Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	2    30	    12	    2	2:2%    44:37%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified			2	2:100%
<b>Education (S) Act 1980</b> s 28 s 65 unspecified			1	1:4%
<b>Firearms Act 1968</b> s 26 s 44 unspecified				
<b>Fire Precautions Act 1971</b> s 9 s 10		2		2:33%
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	3	4	4	11:8%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	25	33	58:11%
<b>Mental Health (S) Act 1960</b> Part IV	28			28:8%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	10	4	2	16:8%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	17	15	10	42:11%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Security Act 1976</b> s 18 unspecified				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified				
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	103	36	33	172:4%
<b>Rates</b>	9	1	10	20:5%
<b>Value Added Tax</b>	578	633	211	1422:6%

**GRAND TOTAL:** 1820:6%



**Edinburgh Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16	6	1	1	8:53%
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	1 4 4	10 2 4		11:11% 6:86% 14:93%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified	3		1	1:50% 3:18%
<b>Education (S) Act 1980</b> s 28 s 65 unspecified	2			2:8%
<b>Firearms Act 1968</b> s 26 s 44 unspecified	2 3	2	1	2:67% 6:30%
<b>Fire Precuations Act 1971</b> s 9 s 10	1 3			1:50% 3:50%
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified			1	1:20%
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified		2	1	3:60%
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	9	2	2	13:10%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	40	70	110:20%
<b>Mental Health (S) Act 1960</b> Part IV	85	N/A	N/A	85:24%
<b>National Assistance Act 1947</b> unspecified	5	4	1	10:48%
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	1	4		5:1%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	34	19	29	82:20%
<b>Road Traffic Act 1972</b> s 90	2		1	3:21%
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified	1	1 2	1	3:9% 2:100%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	250	322	182	504:11%
<b>Rates</b>	19	9	30	58%
<b>Value Added Tax</b>	1871	2464	2495	6830:28%

**GRAND TOTAL: 7766(24%)**

**Glasgow Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified	7	3 2	2	3:100% 11:79%
<b>Building (S) Act 1959</b> s 13 s 16	1	3	2 2	5:83% 3:20%
<b>Burial Grounds (S) Act 1855</b> s 4	4		1	5:83%
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	40   22	36  1	6 1 1	88:85% 1:100% 1:14% 1:7% 22:20%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified	7	1	2	10:59%
<b>Education (S) Act 1980</b> s 28 s 65 unspecified	7 4	12 13	2	21:87% 17:57%
<b>Firearms Act 1968</b> s 26 s 44 unspecified			1	1:100%
<b>Fire Precautions Act 1971</b> s 9 s 10	1 1			1:50% 1:17%
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified	1 1	2	1 3	2:100% 2:40% 4:80%
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified	3 4	6 3 2		9:100% 7:100% 2:40%
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	33	22	15	70:54%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	100	92	192:35%
<b>Mental Health (S) Act 1960</b> Part IV	130	N/A	N/A	130:37%
<b>National Assistance Act 1947</b> unspecified	7			7:33%
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	56	176	234	466:93%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	83	63	48	194:49%
<b>Road Traffic Act 1972</b> s 90	7	2	1	10:71%
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified	4 9	7	6	17:51% 9:23%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	202	1297	357	1850:42%
<b>Rates</b>	24	28	35	87:22%
<b>Value Added Tax</b>	1710	3163	1224	6097:25%

**GRAND TOTAL: 9340:29%**

**Dunfermline Sheriff Court**

	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	1			1:1%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified				
<b>Firearms Act 1968</b> s 26 s 44 unspecified				
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	5	2	2	9:7%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	2	5	7:1%
<b>Mental Health (S) Act 1960</b> Part IV				
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	3	1		4:1%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	6	5	3	14:4%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46			3	3:75%
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified				
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	11	17	55	83:2%
<b>Rates</b>	5	16	9	30:8%
<b>Value Added Tax</b>	369	438	162	819:3%

**GRAND TOTAL: 970 (3%)**

**Inverness Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16		1		1:7%
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	12	1	1	14:13%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified			1	1:50%
<b>Education (S) Act 1980</b> s 28 s 65 unspecified		1		1:10%
<b>Firearms Act 1968</b> s 26 s 44 unspecified	1			1:5%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	3	5		8:6%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	20	19	39:7%
<b>Mental Health (S) Act 1960</b> Part IV	20	N/A	N/A	20:6%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance				
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	3	5	3	11:3%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified				
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	21	42	23	86:2%
<b>Rates</b>	2	7	6	15:4%
<b>Value Added Tax</b>	302	570	179	1051:4%

**GRAND TOTAL: 1248 (4%)**



**Paisley Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified			1	1:7%
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4			1	1:17%
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	7		4	11:10%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified	4	5		9:31%
<b>Firearms Act 1968</b> s 26 s 44 unspecified				
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	3 1	1	3	7:5% 1:33%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	8	14	22:4%
<b>Mental Health (S) Act 1960</b> Part IV	17	N/A	N/A	17:5%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3			1	1:100%
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	27	38	56	121:100%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	9	4		13:3%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified		1		1:3%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	31	36	28	95:2%
<b>Rates</b>	14	15	22	137:35%
<b>Value Added Tax</b>	720	1065	1232	3017:12%

**GRAND TOTAL: 3454 (11%)**

**Stirling Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified		2	2	2:4%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified	2			2:12%
<b>Education (S) Act 1980</b> s 28 s 65 unspecified	1			1:3%
<b>Firearms Act 1968</b> s 26 s 44 unspecified		1		1:33%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified		1		1:1%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V				
<b>Mental Health (S) Act 1960</b> Part IV	2			2:1%
<b>National Assistance Act 1947</b> unspecified	2		2	4%
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	2			2:1%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	5	3	2	10:3%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified	1	4		5:15%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	23	90	47	160:4%
<b>Rates</b>	3	6	17	26:7%
<b>Value Added Tax</b>	330	319	166	815:3%

**GRAND TOTAL: 886 (3%)**

**Dunoon Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified	3	8	1	12:71%
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified				
<b>Firearms Act 1968</b> s 26 s 44 unspecified				
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified		1	1	2:67%
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A	6	9	15:3%
<b>Mental Health (S) Act 1960</b> Part IV	2	N/A	N/A	2:1%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance				
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations		2	1	3:1%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified		3		3:9%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	68	79	39	186:4%
<b>Rates</b>	7	10	9	26:7%
<b>Value Added Tax</b>	120	191	130	441:2%

**GRAND TOTAL:** 690 (2%)

**Duns Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified			1	1:7%
<b>Building (S) Act 1959</b> s 13 s 16	1			1:7%
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified				
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified				
<b>Firearms Act 1968</b> s 26 s 44 unspecified		2		2:7%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified				
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V				
<b>Mental Health (S) Act 1960</b> Part IV				
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance				
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations		1		1:1%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified				
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	39	7	40	86:2%
<b>Rates</b>	4	2	6	12:3%
<b>Value Added Tax</b>	71	75	82	228:1%

**GRAND TOTAL: 331 (1%)**



**Jedburgh Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16	1	1 1		1:7% 2:13%
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified				
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified				
<b>Firearms Act 1968</b> s 26 s 44 unspecified		1	1	2:10%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified	1			1:1%
<b>Local Government (S) Act 1973</b> s 231		1		1:100%

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V	N/A		2	2:1%
<b>Mental Health (S) Act 1960</b> Part IV		N/A	N/A	
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance	1		2	3:1%
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations				
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified	3			3:9%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	56	80	69	205:5%
<b>Rates</b>	5	5	6	16:4%
<b>Value Added Tax</b>	123	141	115	379:1%

**GRAND TOTAL: 615:2%**

**Peterhead Sheriff Court**

Statute	1984	1985	1986	Total
<b>Betting and Gaming Act 1963</b> Schedule 1 para 24 unspecified				
<b>Building (S) Act 1959</b> s 13 s 16				
<b>Burial Grounds (S) Act 1855</b> s 4				
<b>Civic Government (S) Act 1982</b> Sched 1 Para 18 s 42 s 76 s 106 unspecified				
<b>Control of Pollution Act 1974</b> s 13 s 58 unspecified				
<b>Education (S) Act 1980</b> s 28 s 65 unspecified				
<b>Firearms Act 1968</b> s 26 s 44 unspecified			2	2:10%
<b>Fire Precuations Act 1971</b> s 9 s 10				
<b>Gaming Act 1968</b> Schedule 9 para 15 unspecified				
<b>Housing (S) Act 1966</b> s 15 s 26 unspecified				
<b>Housing (S) Act 1969</b> s 27 s 24 unspecified				
<b>Licensing (S) Act 1976</b> s 39 s 104 unspecified				
<b>Local Government (S) Act 1973</b> s 231				

Statute	1984	1985	1986	Total
<b>Mental Health (S) Act 1984</b> Part V				
<b>Mental Health (S) Act 1960</b> Part IV	1	N/A	N/A	1:1%
<b>National Assistance Act 1947</b> unspecified				
<b>Nursing Homes Registration (S) Act 1938</b> s 3				
<b>Public Health (S) Act 1897</b> s 16 s 22 unspecified nuisance				
<b>Registration of Births, Deaths and Marriages (S) Act 1965</b> unspecified re-registrations	2		3	5:1%
<b>Road Traffic Act 1972</b> s 90				
<b>Sewerage (S) Act 1968</b> s 10 s 46				
<b>Social Work (S) Act 1968</b> s 16 s 80 unspecified			1	1:3%
<b>Unspecified warrants for:</b>				
<b>Income Tax</b>	117	72	77	266:6%
<b>Rates</b>	7	7	9	23:6%
<b>Value Added Tax</b>	171	317	166	604:2%

**GRAND TOTAL: 902:3%**